Supreme Court, U.S.
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No. _____

In The
Supreme Court of The United States
October Term 1997

MEEHAN SEAWAY SERVICE COMPANY, et al,
Petitioners,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, et al,
Respondents.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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228 pp

QUESTIONS PRESENTED FOR REVIEW

I. Whether Petitioner's due process rights were violated by the actions of the Administrative Law Judge?

A) Whether the Administrative Law Judge violated Petitioner's due process rights by proceeding beyond the case presented and by scouring the record to award benefits on a theory of recovery never presented by Claimant?

B) Whether the Administrative Law Judge violated Petitioner's due process rights by utilizing the presumption contained within 33 USC § 920(a) to award benefits on a theory of recovery never prosecuted by Claimant?

II. Whether the delay in the administrative review proceedings denied Employer due process of law?

LIST OF PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

Petitioners are Meehan - Seaway Service Company and Frank Gates/Acclaim. A party with a pecuniary interest in the outcome is Signal Mutual Indemnity Association.

Petitioners and the interested party are independent entities with no subsidiaries or corporate parents.

Respondent, Robert Hizinski, is an individual.

The Director, OWCP was named as a party below. The Director did not enter an Appearance or participate in the case below. American Grain Trimmers was a party before the Benefits Review Board, but did not participate below.

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George Banta Company, Inc. v. N.L.R.B., 686 F.2d 10 (D.C. Cir. 1982). 10

Johnson v. Mississippi, 403 U.S. 212, 91 S.Ct. 1778, 29 L.Ed.2d. 423 (1971). 7

N.L.R.B. v. Blake Construction Company, 663 F.2d 272 (D.C. Cir. 1981). 9

N.L.R.B. v. Tamper, Inc., 522 F.2d 781 (4th Cir. 1975). 7, 8

U. S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP, 455 U.S. 608, 102 S.Ct. 1312, 71 L.Ed.2d. 495 (1982). 8, 10, 11

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Crowell v. Benson, 285 U.S. 22, 52 S.Ct. 285, 76 L.Ed. 598 (1932). 12

Del Vecchio v. Bowers, 296 U.S. 280, 56 S.Ct. 190, 80 L.Ed. 229 (1935). 15

Director, OWCP v. Greenwich Collieries, 512 U. S. 267, 114 S.Ct. 2251, 129 L.Ed.2d. 221 (1994). 15

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Texas Department of Community Affairs v. Burdine, 450 U. S. 248, 101 S.Ct. 1089, 67 L.Ed.2d. 207 (1981). 15

U. S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP, 455 U.S. 608, 102 S.Ct. 1312, 71 L.Ed.2d. 495 (1982). 13, 14, 15

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II. PETITIONER'S RIGHTS TO DUE PROCESS WERE VIOLATED BY THE EXTENSIVE DELAY IN THE ADMINISTRATIVE APPEAL.

Abbott v. Louisiana Insurance Guaranty Association, 889 F.2d 626 (5th Cir. 1989), cert. den., 494 U.S. 1082, 110 S.Ct. 1813, 108 L.Ed.2d. 944 (1989). 18

Fusari v. Steinberg, 419 U.S. 379, 95 S.Ct. 533,42 L.Ed.2d. 521 (1975). 19

Kelly v. Railroad Retirement Board, 625 F.2d 486 (3rd Cir. 1980). 19

Maxon Marine, Inc. v. Director, OWCP, 39 F.3d 144 (7th Cir. 1994). 20

OPINIONS BELOW

Meehan Seaway Service Company v. Director, OWCP, 125 F.3d 1163, 31 BRBS 114 (Crt) (8th Cir. 1997).

Meehan Seaway Service Company v. Director, OWCP, 4 F.3d 633, 27 BRBS 108 (Crt) (8th Cir. 1993). Appeal of Denial of Motion for Stay.

Robert Hizinski v. Meehan Seaway Services and Randles and Holbrook, BRB #92-2285 and 92-2285A (1996).

Robert Hizinski v. American Grain Trimmers, Inc. and Meehan Seaway Services, 90 LHC 3254 (1992). United States Department of Labor, Office of Administrative Law Judges.

STATEMENT OF JURISDICTION

This matter arises under the Longshore and Harbor Workers' Compensation Act, 33 USC § 901 et seq. Jurisdiction was had in the Court of Appeals under 33 USC § 921(c) upon the final decision of the Benefits Review Board of the United States Department of Labor. The Judgement of the Court of Appeals was entered on September 15, 1997.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THIS CASE

U. S. Constitution Amendment V provides:

> "No person shall....be deprived of....property, without due process of law...

Longshore and Harbor Workers' Compensation Act, 33 USC § 901 et seq. as amended in 1984, provides in pertinent part:

> Sec. 2 When used in this Act--
>
> ....
>
> (2) The term "injury" means accidental injury or death arising out of and in the course of employment...
>
> Sec. 12.(a) Notice of an injury...in respect of which compensation is payable under this Act shall be given within thirty days after the date of such injury...
>
> (b) Such notice shall be in writing, shall contain the name and address of the employee and a statement of the time, place, nature, and cause of the injury or death, and shall be signed by the employee...
>
> (c) Notice shall be given to the deputy commissioner...and

to the employer...

Sec. 13.(a) ...[T]he right to compensation for disability or death under this Act shall be barred unless a claim therefor is filed within one year after the injury or death.

Sec. 20. In any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary--

> (a) That the claim comes within the provisions of this Act.

Sec. 21.(b)(1) There is hereby established a Benefits Review Board...

(b)(3) The Board shall be authorized to hear and determine appeals raising a substantial question of law or fact taken by any party in interest from decisions with respect to claims of employees under this Act and the extensions thereof.

(c) Any person adversely affected or aggrieved by a final order of the Board may obtain a review of that order in the United States court of appeals for the circuit in which the injury occurred...

STATEMENT OF THE CASE

Respondent, Robert Hizinski (hereinafter "Claimant"), injured his left knee on December 7, 1979 while working as a longshoreman for American Grain Trimmers. Apdx. B-28-30. He returned to his employment as a longshoreman. Apdx. B-30.

On October 14, 1989, the Claimant stopped working as a longshoreman. The Claimant's right knee was bothering him. The Claimant asserted that he had injured his right knee while working for American Grain Trimmers. At this time, the insurance carrier having coverage for American was in dissolution. Apdx. B-155. He further asserted a claim against the Petitioner, Meehan Seaway Service Company (hereinafter "Employer"). Apdx. B-46-7.

The Claimant filed a claim under the Longshore and Harbor Workers' Compensation Act, 44 Stat. 1424, as amended, 33 USC § 901 et seq.

At the formal hearing, the Claimant presented evidence that he had suffered a specific, traumatic injury to his right knee. He testified at deposition and at the formal hearing that he stepped in a hole between bags of grain and twisted his right knee. Apdx. B-46-7. He reportedly gave notice of this incident to his immediate supervisor, George Petrovich, who testified at the formal hearing to a report of an injury. Apdx.

Petrovich, who testified at the formal hearing to a report of an injury. Apdx. B-47, 49.

Prior to the formal hearing, the Claimant asserted that his right knee problems stemmed from his 1979 injury with American Grain Trimmers. He insisted he had injured his right knee while working for American Grain. Apdx. B-42-3. Claimant's attorney stated that the Claimant had not suffered an accident while working for Employer, and related all conditions back to American Grain Trimmers. Apdx. B-61-2; Apdx. C-187-8. In addition to his deposition testimony, the Claimant gave answers to written interrogatories, in which he likewise identified a specific accident occurring as a result of stepping between bags of grain. Apdx. C-189. In the opening statement at the formal hearing, Claimant's counsel identified a specific accident occurring while stepping between bags of grain and then falling. Apdx. C-190.

Despite the Claimant's insistence that the same knee was involved in both claims, the Administrative Law Judge found that the injury in 1979 was to his left knee. Apdx. B-84. The Administrative Law Judge then examined the claim regarding the right knee. Apdx. B-87. He did not credit the Claimant's

testimony or that of his supervisor as to the specific traumatic event. The Administrative Law Judge found the Claimant did not injure his right knee by stepping between bags of grain. Apdx. B-95.

Despite the Claimant's total failure to assert or prosecute any other theory of recovery at the formal hearing, the Administrative Law Judge found the Claimant had established a prima facie case under a theory of cumulative trauma. The Administrative Law Judge found the Claimant was entitled to the benefits of the presumption contained within Section 20(a) of the Act (33 USC § 920(a)), and the Employer did not present substantial evidence to rebut the presumption. Apdx. B-110-111. The Administrative Law Judge awarded temporary total disability, medical expenses, and permanent and total disability benefits. Apdx. B-149-151.

Employer timely appealed the Decision of the Administrative Law Judge to the Benefits Review Board of the United States Department of Labor on August 11, 1992. Concurrent with its appeal to the Benefits Review Board, Employer also filed with the Board a Motion for Stay. The Motion was denied on August 20, 1992. An Amended Motion for Stay was filed with the Board. The Board denied the amended Motion.

Employer took an appeal of the Board's denial of the Amended Motion for Stay. The Eighth Circuit Court of Appeals affirmed the denial of the Amended Motion on September 9, 1993.

The matter remained with the Benefits Review Board. Employer filed a Motion to expedite the Appeal on January 30, 1995. Apdx. C-151. The Board did not render its final decision until September 12, 1996. The Board affirmed the decision of the Administrative Law Judge. Apdx. B-182.

Employer took a timely appeal of the Decision of the Benefits Review Board to the Eighth Circuit Court of Appeals. The court affirmed the decision of the Benefits Review Board. 125 F.3d 1163 (8th Cir. 1997). Apdx. A-22. Employer Petitions this Court for Certiorari.

ARGUMENT

I. PETITIONER'S DUE PROCESS RIGHTS WERE VIOLATED BY THE ACTIONS OF THE ADMINISTRATIVE LAW JUDGE.

The actions of the Administrative Law Judge deprived Employer of its due process rights to an informal tribunal and of its right to fair notice of the claim being brought and decided. There is no question that the Claimant only prosecuted a claim for a specific trauma accident, alleged to have occurred on October 14, 1989. Prior to the formal hearing, the Claimant asserted in his deposition that he suffered specific trauma. He asserted in his responses to written discovery that he suffered specific trauma. In a letter to the Office of Workers' Compensation Programs, the Claimant's attorney stated the Claimant had not suffered a re-injury to his knee while working for Employer. The attorney further reported the Claimant's knee was no worse on October 14, 1989, than it had been on any other day.

At the formal hearing, his attorney asserted a specific trauma. The Claimant testified he sustained a specific trauma. He presented a witness, George Petrovich, who testified to a reported specific accident on that date. In his post-hearing brief, the Claimant asserted only that he was injured by a specific trauma

to the same knee that he had injured while working for American Grain Trimmers.

Quite properly, the Administrative Law Judge found that the knee injured (left) while working for American Grain Trimmers was not the same knee that the Claimant asserted he injured while working for Employer (right). Further, the Administrative Law Judge properly found that Claimant did not suffer a specific accident on October 14, 1989.

These findings were proper and supported by the evidence. The inquiry should have ended here. It did not.

A) PETITIONER'S DUE PROCESS RIGHTS WERE VIOLATED WHEN THE ADMINISTRATIVE LAW JUDGE LOOKED BEYOND THE CASE PRESENTED AND SCOURED THE RECORD TO AWARD BENEFITS ON A THEORY NEVER PROSECUTED BY CLAIMANT.

The Administrative Law Judge violated Employer's due process rights when he continued to review the record in order to find a means of awarding compensation to the Claimant. He pieced together evidence to support a theory of cumulative trauma of a pre-existing condition. This occurred notwithstanding the fact that the Claimant did not assert or prosecute this theory of compensability at the formal hearing.

Sua sponte, the Administrative Law Judge chose to determine a manner to

compensate the Claimant for his knee problems. In doing so, the Administrative Law Judge became an advocate acting on behalf of the Claimant, prosecuting an unasserted claim for benefits on behalf of the Claimant. The actions of the Administrative Law Judge occurred without notice, without opportunity to present evidence, and without opportunity to respond. This is impermissible and constitutes the gravest of procedural errors.

The Employer's constitutional rights guarantee due process of law before it can be deprived of property. U.S. Const. Amend V. There is no question that due process demands a fair hearing before an impartial tribunal. See, e.g. Johnson v. Mississippi, 403 U.S. 212, 216, 91 S.Ct. 1778, 1780, 29 L.Ed.2d. 423 at 427 (1971). When the Administrative Law Judge steps outside of the role of adjudicator, there is a violation of due process. When the Judge becomes, in effect, a litigant on an issue, he has failed to act with the impartiality necessary to conduct his office. N.L.R.B. v. Tamper, Inc., 522 F.2d 781 (4th Cir. 1975).

In the present case, the Claimant did not prosecute a theory of cumulative trauma. Yet, the Administrative Law Judge probed the record to award

compensation and undertook the "prosecutorial functions of ferreting out a case against the Defendant/Employer, [and] he overstepped the permissible scope of his duties". Tamper, 522 F.2d at 790.

Further, employers under the Longshore Act are entitled to sufficient notice of the claim. Under the Act, the Claimant is required to give notice to the Employer (33 U.S.C. §912) and to file a Claim for Compensation with the Office of Workers' Compensation Programs (33 U.S.C. §913). The claim to the Office of Workers' Compensation Programs, notice under Section 12, and pleadings in any other type of litigation "serve [] the purpose of notifying the adverse party of the allegations and of confining the issues to be tried and adjudicated". U. S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP, 455 U.S. 608, 613, 102 S.Ct. 1312, 1317, 71 L.Ed.2d. 495, 501 (1982) [Footnote omitted].

The process in the prosecution of a claim under the Longshore Act is such that the pre-trial discovery available allows the parties to further explore the nature of the claim. In the present case, as the case proceeded to hearing, the Claimant only identified specific trauma. The Court of Appeals erred in finding no error when Claimant had

demonstrated "uncertainty as to the nature of [Claimant's] injury with a possibility of cumulative trauma". Apdx. A-10. That possibility was eliminated by counsel's opening statement identifying only a specific injury. Thus, the logic of the court below is in with the above citations discussing notice confining the issues to be tried.

The present situation should be found analogous to proceedings before the National Labor Relations Board. The NLRB may not make findings or order remedies on violations not charged in the complaint or litigated in the subsequent hearing. N.L.R.B. v. Blake Construction Company, 663 F.2d 272 at 279 (D.C. Cir. 1981) [citations omitted]. Similarly, the Administrative Law Judges and the Benefits Review Board of the Department of Labor should not make findings on a theory of compensability not prosecuted by an allegedly injured employee.

Certainly, while an employee may suggest the presence of an injury, the process existing within the practice before Administrative Law Judges of the Department of Labor is such that by the time the case reaches the formal hearing, the issues are well defined and the battle can be joined. This process allows the employer "more than a mere declaration that the employee has

received an injury or is suffering from an illness that is related to his employment; ...[The employer receives] enough details about the nature and extent of the injury or disease to allow the employer to conduct a prompt and complete investigation of the claim so that no prejudice will ensue". U.S. Industries, 455 at 613, n.6, citing 1A E. Jhriad, A. Sann, N. Golden, and B. Chase, Benedict on Admiralty, § 71, page 4-5 (7th Ed. 1981), 102 S.Ct. at 1316, n.6, 71 L.Ed.2d. at 501, n.8. It should not be only that there was "uncertainty" as to the claim and a different theory was a "possibility". cf. Apdx. A-10.

As such, there may be a difference between what was initially asserted by the Claimant at the start of the process and the ultimate theory of recovery defined by the Claimant's attorney in his opening statement. However, the theory of recovery set forth by the attorney substantially differs from the theory of recovery granted by the Administrative Law Judge. This variance between the issues contemplated in the proceeding and the violation that was ultimately found should be considered so substantial that the Employer's rights were violated. cf. George Banta Company, Inc. v. N.L.R.B., 686 F.2d 10, 22, n.15 (D.C. Cir. 1982). As the Circuit Court of Appeals in U. S.

Industries was not allowed to find a means of compensation not prosecuted, neither should an administrative law judge.

As the Administrative Law Judge committed error, the Benefits Review Board and the Circuit Court of Appeals committed error in allowing the decision to stand. The courts should not enforce an error in the absence of an allegation by the Claimant at the formal hearing or a meaningful opportunity to litigate the underlying issue in the hearing itself. cf. Blake Construction, 663 F.2d at 279 [citations omitted].

The failure of the Administrative Law Judge to stop his inquiry upon rejection of the Claimant's theory of compensation was error. The Longshore Act contains no special provisions that allow an Administrative Law Judge to proceed in a prosecutorial fashion on behalf of a claimant. The formal hearing in the present case involved the prosecution of, and the defense of a claim for specific trauma. The evidence does not support this claim of specific trauma, as the Administrative Law Judge found. When the Administrative Law Judge continued to scour the record, the Employer's due process rights were eviscerated. To allow such proceedings would render useless the ability to know

the theory of the employee's claim for compensation, even after utilizing discovery tools available.

B) PETITIONER'S DUE PROCESS RIGHTS WERE VIOLATED IN THE USE OF THE PRESUMPTION CONTAINED WITHIN 33 USC § 920(a) TO AWARD BENEFITS ON A THEORY OF RECOVERY NEVER PROSECUTED BY CLAIMANT.

The Administrative Law Judge further violated the Employer's due process rights by finding that the presumptions contained in Section 20 of the Act applied in order to award benefits for cumulative trauma. As the Claimant did not prosecute a claim for cumulative trauma, he did not present any positive evidence on that theory. Yet, the Administrative Law Judge found that the Claimant had established a prima facie case and was entitled to the benefit of the presumption available in Section 20(a) of the Act. 33 USC § 920(a). This Court has noted that "the coverage of the presumption is debatable...." U.S. Industries, 455 U.S. at 612, 102 S.Ct. at 1316, 71 L.Ed.2d. at 501. The presumption is obviously in derogation of the common law, as the Act has substituted a system of no fault liability to provide remedies to injured longshoremen. See, e.g. Crowell v. Benson, 285 U.S. 22, 52 S.Ct. 285, 76 L.Ed. 598 (1932). The presumption in

Section 20(a) should be strictly interpreted.

A claimant achieves the benefit of the presumption by establishing proof of an injury as defined in Section 2(2) of the Act, i.e., establishing that an accidental injury arose out of and in the course of employment. The Administrative Law Judge suggested that the existence of the knee condition was an injury. Apdx. B-94.[1] The mere existence of physical impairment is plainly insufficient to shift the burden of proof to the employer. U. S. Industries, 455 U.S. at 615, 102 S.Ct. at 1317, 71 L.Ed.2d. at 502. Even if a claimant has an unfettered right to amend his claim to conform to the proof, the presumption by its terms cannot apply to a claim that has never been made. U. S. Industries, 455 U.S. at 613, 102 S.Ct. at 1316, 71 L.Ed.2d at 501.

The Claimant did not prosecute a cumulative trauma claim and did not allege that his knee condition was employment bred, except to state that it was the result of specific trauma. When specific trauma was ruled out, there

[1] While the Administrative Law Judge suggested that the fact of injury was undisputed, the question of an "injury" used in § 2(2) was in dispute.

should have been no further inquiry and the Claimant should not have been entitled to the presumptions under Section 20. The Court of Appeals, relying on the previously discussed "uncertainty" as to the injury and the "possibility" of cumulative trauma. [Apdx. A-10] found Claimant entitled to the presumption. Apdx. A-12. "Even if such a vague claim stated a prima facie case of compensability, the statutory presumption does not require the Administrative Law Judge to address and the employer to rebut every conceivable theory of recovery, at least when the Claimant is represented by counsel,..." U. S. Industries, 455 U.S. at 614, 102 S.Ct. at 1317, 71 L.Ed.2d. at 502. Since the applicability of the Act has not been established by the Claimant, the presumption could not be invoked.

Further, given the statement by the attorney for the Claimant that there had been no aggravation of the pre-existing condition, the attorney's statements should be binding on the Claimant as a judicial admission. See, Keller v. United States, 58 F.3d 1194, 1198, n.8 (7th Cir. 1995). This statement by counsel certainly should be considered substantial evidence to rebut the presumption. The Court of Appeals noted substantial evidence to rebut the

presumption. Apdx. A-12. However, the Court found that substantial evidence to the contrary did not remove the presumption from the case. Apdx. A-13.

This Court has noted that the presumption is subject to the so-called "bursting bubble" rule of evidence. Once evidence is presented in opposition to the presumption, the presumption vanishes. Del Vecchio v. Bowers, 296 U.S. 280, 56 S.Ct. 190, 80 L.Ed. 229 (1935). The evidence contrary to the presumption is to be viewed in a light most favorably to the opponent of the presumption. U. S. Industries, 455 U. S. at 612, n.5, 102 S.Ct. at 1316, 71 L.Ed.2d. at 501; Graham Handbook of Federal Evidence, 3rd Ed. (1991), § 301.12. The statement by the attorney must be considered to have rebutted the presumption, as it is a minimum quantum of evidence by the party against whom the presumption operates. Nothing more is required. See, Texas Department of Community Affairs v. Burdine, 450 U. S. 248, 255, n.8, 101 S.Ct. 1089, 1094 n.8, 67 L.Ed.2d 207, 216, n.8 (1981). When the presumption is out of the case, the matter proceeds on a level playing field with the ultimate burden of proof resting on the Claimant. Director, OWCP v. Greenwich Collieries, 512 U. S. 267, 114 S.Ct. 2251, 129 L.Ed.2d 221 (1994).

The Court below erred in disregarding this authority to allow the award of compensation to stand. The Court also assumes the decision of the Administrative Law Judge was rendered merely on his weighing substantial evidence presented by both parties. Apdx. A-13. To the contrary, the Administrative Law Judge found, despite evidence to the contrary, "There is no other contrary evidence of record that would overcome the presumption..." Apdx. B-111. It is clear that despite substantial evidence to rebut the presumption, the decision awarding benefits was made based on the presumption, not on the evidence. This was error.

The Claimant's evidence in the present case suffers a substantial variance from the pleadings. This should be fatal to the claim, as the Employer was not liable on the theory of recovery prosecuted by Claimant. Yet, the Employer has been found liable on a theory of compensability substantially different than was pleaded and on a theory of recovery that was never prosecuted. This result was obtained when the Administrative Law Judge acted as investigator and prosecutor on behalf of Claimant. It defies logic to allow the use of the presumption in support of

a claim that was never made. The actions by the Administrative Law Judge constituted such grievous error that the Employer's due process rights were violated.

The Administrative Law Judge should not have pursued his search for a theory of compensation beyond that which was presented by the Claimant. He should not have assisted the Claimant in this manner. The findings denying a specific trauma on October 14, 1989 should be affirmed. However, any additional findings made by the Administrative Law Judge should be reversed or vacated, as those findings violated the Employer's right to due process.

II. PETITIONER'S RIGHTS TO DUE PROCESS WERE VIOLATED BY THE EXTENSIVE DELAY IN THE ADMINISTRATIVE APPEAL.

In proceedings before the Benefits Review Board, the Employer sought a stay of benefits. The Board denied the Motion for Stay. This ruling was affirmed by the Eighth Circuit. Subject of that ruling is not an issue here.

The Notice of Appeal of the decision of the Administrative Law Judge was filed with the Benefits Review Board in 1992. The decision of the Circuit Court of Appeals affirming the denial of the stay was filed on September 9, 1993. The

matter was remanded to the Benefits Review Board. Despite the Employer's Motion to Expedite Proceedings, the Board's decision was not filed until September 12, 1996.

While the appeal on the issue of the stay was pending in the Circuit Court, the parties continued to follow the briefing schedule established by the Board. However, despite all the activity, the Board took no action on the case from the time the case was initially filed until it notified the parties in May, 1996 that it had lost Employer's exhibits. Employer was required to submit a copy of its exhibits.

During the delay, Petitioner has been compelled to make payments of the benefits ordered by the Administrative Law Judge, regardless of procedural or constitutional errors committed by the Administrative Law Judge. Employer must be afforded a "meaningful opportunity" for post-deprivation review in order to have its due process rights protected. Abbott v. Louisiana Insurance Guaranty Association, 889 F.2d 626, 631 (5th Cir. 1989), cert. den., 494 U.S. 1082, 110 S.Ct. 1813, 108 L.Ed.2d. 944 (1989). However, "at some point a delay in the opportunity for administrative and judicial review can amount to a denial of due process". Abbott, 889 F.2d at 632-3.

"Rapidity of administrative review is a significant factor in assessing the sufficiency of the entire process". Fusari v. Steinberg, 419 U.S. 379, 389, 95 S.Ct. 533, 540, 42 L.Ed.2d. 521, 529 (1975). The Third Circuit Court of Appeals believed that four years of delay in processing an application for benefits was inexcusable and denied due process. Kelly v. Railroad Retirement Board, 625 F.2d 486, 496 (3rd Cir. 1980).

There is no conceivable nor rational basis for the appeal to the Benefits Review Board in the present case to have taken over four years from the filing of the Notice of Appeal to the issuance of the decision and the Order of the Benefits Review Board. The Court of Appeals below suggested that some of the delay would be attributable to the appeal by Emplóyer of the denial of the Motion for Stay. Apdx. A-22. Nevertheless, the delay was unwarranted and unreasonable.

There are no circumstances existent that permit the Board to sit back and avoid processing the appeal for greater than four years. There are no circumstances that permit extensive inaction in light of the Motion to Expedite. To allow such inaction is to condone administrative and bureaucratic bungling and sloth by the Administrative body charged with providing rapid

administrative review.

Employer's due process rights to a speedy post-deprivation hearing have been violated. Employer has been forced to pay almost six years of benefits (from the date of the alleged accident to the date of the Board's Order) before the decision was reviewable by a court comprised of Article III judges. It is obvious that the review process in the instant case denied Employer of a timely, speedy, and meaningful review guaranteed by due process provisions. The administrative review procedures are unconstitutional as applied.

While the "tools available to courts for remedying administrative delay are limited and weak" [Maxon Marine, Inc. v. Director, OWCP, 39 F.3d 144 at 147 (7th Cir. 1994)], This Court should find that unconstitutional delay in administrative review should not be permitted. The Board should be held to a higher standard than that under which it operated in the present case.

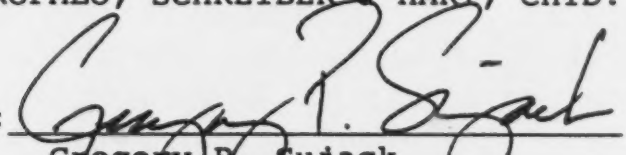
CONCLUSION

Petitioner's respectfully request this Honorable Court grant a Writ of Certiorari, directing the review of the decision of the Court of Appeals in the underlying decisions of the administrative bodies of the United States Department of Labor. Petitioner's due process rights were violated by the actions of the Administrative Law Judge. The due process rights were violated when the Administrative Law Judge acted as an advocate and prosecutor on behalf of the Claimant in finding compensation on a theory of recovery that the Claimant did not put forth in the formal hearing. Further, the Administrative Law Judge violated the Petitioner's due process rights by finding that the presumptions contained within the Longshore and Harbor Workers' Compensation Act would apply to the theory of recovery never prosecuted by the Claimant.

Petitioner's rights to due process were further violated by the extensive delay by the Benefits Review Board of the United States Department of Labor in processing the administrative appeal in this matter. As of this filing, over eight years of benefits have accrued and been paid to the Claimant. Six years were the result of delay by the Benefits Review Board.

WHEREFORE, Petitioners will respectfully request this Honorable Court to reverse the decision of the Circuit Court of Appeals for the Tenth Circuit, and of the Benefits Review Board. Petitioners will also ask this Court to reverse or vacate the Decision of the Administrative Law Judge, insofar as it awards benefits under the Longshore and Harbor Workers' Compensation Act. Further, petitioners will ask this Court to find that the delay at the administrative level was so extensive as to have violated petitioner's rights to meaningful post-deprivation review.

Respectfully submitted,
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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

OPINION

FILED SEPTEMBER 15, 1997
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United States Court of Appeals
for the Eighth Circuit

No. 96-3922

Meehan Seaway Service Company, Employer, and Frank Gates/Acclaim,	*	
Petitioners,	*	
v.	*	
Director, Office of Workers' Compensation Programs, United States Department of Labor, American Grain Trimmers, Inc., and Robert Hizinski,	*	Review of Order of Benefits Review Board
Respondents.	*	

Submitted: June 9, 1997
Filed: September 15, 1997

Before LOKEN and ROSS, Circuit Judges, and FENNER,[1] District Judge.

FENNER, District Judge.

Meehan Seaway Service Company (Meehan) petitions for review of an order of the Benefits Review Board (BRB) of the Department of Labor awarding benefits to Robert Hizinski on his claim arising under the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. § 901 et seq.

Hizinski worked as a longshoreman in Duluth, Minnesota until October 14, 1989. On that date, Hizinski was employed by Meehan. His job on October 14, 1989, was to carry 110 pound grain sacks across the uneven surface of other sacks as a vessel was being loaded. At the end of his work day, Hizinski told his supervisor that his right knee was giving him pain.

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[1]The Honorable Gary A. Fenner, United States District Judge for the Western District, sitting by designation.

Hizinski underwent knee surgery three months later and has not worked since that time.

Hizinski sought benefits for his injured right knee under the LHWCA pursuant to his amended claim which was filed on May 9, 1990. Hizinski alleged two injuries to his right knee. Hizinski asserted a claim against American Grain Trimmers (American) for injury to his right knee while working for American on December 1, 1979, and a claim against Meehan for injury while working for Meehan on October 14, 1989.

A hearing was held before an administrative law judge (ALJ). The ALJ found that in 1979, Hizinski injured his left knee while working at American and, therefore, American was not liable for the complaint of right knee injury. The ALJ further found that Hizinski was entitled to the 33 U.S.C. § 920(a) presumption with regard to the causal nexus between his right knee problems and his employment with Meehan. The ALJ further found that rebuttal had not been established with regard to this

condition. The ALJ concluded that claimant was permanently totally disabled, as Meehan did not establish the existence of suitable alternate employment, and awarded benefits based on an average weekly wage of $186. Meehan appealed the decision of the ALJ to the Benefits Review Board of the Department of Labor which affirmed the decision of the ALJ.

STANDARD OF REVIEW

In LHWCA proceedings the BRB must accept the ALJ's findings unless they are contrary to the law or unsupported by substantial evidence. **Munguia v. Chevron U.S.A., Inc., 999 F.2d 808 (5th Cir.), rehearing denied, 8 F.3d 24 (5th Cir. 1993), cert. denied, 114 S.Ct. 1839, 128 L.Ed.2d 466 (1994).** On appeal from a decision of the BRB, the Court of Appeals reviews the decision of the ALJ merely to determine that the BRB adhered to the proper standard of review. **Robinson v. Missouri Min. Co., 955 F.2d 1181, 1183 (8th Cir. 1992).** While appellate review of legal conclusions is plenary, review of factual findings is limited. **Brown v.**

Director, OWCP, U.S. Dept. of Labor, 914 F.2d 156, 158 (8th Cir. 1990). Factual findings of the ALJ are conclusive if supported by substantial evidence in the record. **Id.**

SUFFICIENCY OF CLAIM AND NOTICE

On appeal Meehan argues that it was denied due process by the ALJ awarding benefits on a theory that the claimant, Hizinski, did not assert. Meehan argues that Hizinski was asserting a claim against it for a specific trauma accident occurring on October 14, 1989, which the ALJ found did not occur. Meehan argues that it was not given adequate notice to defend against a claim of cumulative trauma or aggravation of pre-existing condition which was the finding of the ALJ. Meehan argues further on this point that by deciding Hizinski's claim on a theory not presented, the ALJ improperly failed to maintain a position of impartiality.

In conducting a hearing, the BRB is not bound by the technical or formal

rules of procedure except as provided in the LHWCA. Nothing within the LHWCA makes the formal rules of procedure applicable. 33 U.S.C. § 923(a). However, 33 U.S.C. § 912(b) requires that the claimant timely give the Deputy Commissioner and his employer notice of his injury, and provides further that "[s]uch notice . . . shall contain . . . a statement of the time, place, nature, and cause of the injury." The claim, like the notice required by § 12 and like the pleadings required in any type of litigation, serves the purposes of notifying the adverse party of the allegations and of confining the issues to be tried and adjudicated. **U.S. Industries Federal Sheet Metal, Inc. v. Director, Office of Workers' Compensation Programs, U.S. Dept. of Labor, 455 U.S. 608, 613 (1982).**

The statement of the claim must be more than a mere declaration that the employee has received an injury or is suffering from an illness that is related to his employment; it must contain enough details about the nature and extent of

the injury or disease to allow the employer to conduct a prompt and complete investigation of the claim so that no prejudice will ensue. **Id.**

Citing Larson, The Law of Workmen's Compensation, the Supreme Court in **U.S. Industries Federal Metal, Inc.**, noted that:

> an informal substitute for a claim may be acceptable if it "identif[ies] the claimant, indicate[s] that a compensable injury has occurred, and convey[s] the idea that compensation is expected." [3A. Larson, The Law of Workmen's Compensation], § 78.11, p 15-9; that "considerable liberality is usually shown in allowing amendment of pleadings to correct . . . defects," unless the "effect is one of undue surprise or prejudice to the opposing party," **id.**, p 15-11; and that "wide latitude is allowed" as to variance between

> pleading and proof, "[b]ut if the variance is so great that the defendant is prejudiced by having to deal at the hearing with an injury entirely different from the one pleaded, the variance may be held fatal," **id.**, at 15-13--15-14.

U.S. Industries Federal Sheet Metal, Inc., 455 U.S. at 613-14.

Hizinski's claim notified Meehan that he was seeking benefits in regard to injury to his right knee related to his employment. Hizinski alleged that "[w]hile doing heavy hold work carrying wheat bags weighing approximately 110 pounds and carrying them 5 to 20 feet at a time, employee injured his knee." Hizinski alleged in his complaint that the date of his injury was October 14, 1989. In his deposition and at trial, Hizinski testified that his knee was injured on October 14, 1989, when he stepped in a hole between bags of grain and twisted his knee. Nonetheless, the ALJ determined that the evidence did not support a finding of a specific accident

as represented but rather that the evidence supported a finding of cumulative trauma or aggravation of preexisting injury. The BRB affirmed the decision of the ALJ.

Hizinski's complaint notified Meehan that he had received an injury to his right knee which he claimed was related to his employment. Furthermore, Hizinski filed a Pretrial Stipulation in which he provided notice to Meehan that he wished to reserve the right to claim that his knee injury was in the nature of a "Gillette" injury or occupational disease. The BRB defined a "Gillette" injury as a cumulative trauma injury under state law. Additionally, three months prior to the hearing herein, counsel for Hizinski sent a letter to the Department of Labor with a copy to the claim representative for Meehan's insurer stating that after having time to consider the injury that the "work [Hizinski] did at Meehan (not the accident he had) temporarily aggravated his knee condition." At the hearing, Hizinski testified that his knee

condition became progressively worse over the years. Hizinski notified the Department of Labor in 1985 that his knee was hurting him more and more. In 1986, Hizinski was examined for increasing knee pain by two physicians and prescribed medication. Hizinski's treating physician after October 1989 reflected in his notes that Hizinski was having continuing problems with his right knee.

The record reflects that Meehan was put on notice prior to the hearing date that there was uncertainty as to the nature of Hizinski's injury with a possibility of cumulative trauma. Furthermore, there was substantial evidence presented at the hearing to support the finding of the ALJ. Meehan was not prejudiced by the lack of specificity as to the nature of the injury under the circumstances presented here. The finding of the ALJ does not reflect a lack of impartiality. Meehan's challenge to the sufficiency of the claim and lack of notice is denied.

SECTION 920(a) PRESUMPTION

Meehan argues on this point that Hizinski was not entitled to the presumption that his claim was within the LHWCA as provided under 33 U.S.C. § 920(a) and that even if he was that the ALJ erred in finding that Meehan failed to rebut the presumption.

Title 33 U.S.C. § 920(a) provides that in any proceeding for enforcement of a claim for compensation under the LHWCA, it shall be presumed that the claim comes within the provisions of the act. However, this presumption does not apply to a claim that has never been made and is, therefore, not properly before the ALJ. **U.S. Industries Federal Sheet Metal, Inc. v. Director, Office of Workers' Compensation Programs, U.S. Dept. of Labor, 455 U.S. at 612-13.** Before the presumption will attach a claimant must state a prima facie claim for compensation which must at least allege an injury that arose in the course of employment as well as out of employment. **Id. at 615.** Arising "out of" and "in the course of" employment are

separate elements: the former refers to injury causation; the latter refers to the time, place, and circumstances of the injury. **Id.** Not only must the injury have been caused by the employment, it also must have arisen during the employment. **Id.**

Meehan argues that Hizinski is not entitled to the Section 920(a) presumption because he did not elect to proceed under a theory of cumulative trauma and he did not present testimony of a degenerative condition. As addressed above under Meehan's challenge to the sufficiency of the claim, Hizinski did make a sufficient claim for a degenerative condition or cumulative trauma and there was substantial evidence to support the finding of the ALJ. Meehan's claim that Hizinski was not entitled to the § 920(a) presumption is denied.

Meehan argues further in regard to the Section 920(a) presumption that the ALJ erred in finding that the presumption was not rebutted. Meehan argues that once it presented evidence in opposition

to the presumption that the presumption vanished. **Meehan cites Del Vecchio v. Bowers, 296 U.S. 280 (1935)** in support of its position. Del Vecchio does not so hold.

Del Vecchio holds that if the only evidence presented is by the employer and the evidence is contrary to the claim made, that the case must be decided upon that evidence. **Id. at 193.** However, where the claimant and the employer each offer substantial but conflicting evidence in support of their respective positions, the determination of the ALJ as to the weight of the evidence will not be disturbed. **Id. at 193.** Meehan argues that there is substantial evidence in the record to rebut the presumption. However, as previously addressed herein, Hizinski also presented substantial evidence in support of his claim. The credibility determinations and considerations of the ALJ as to the weight of the evidence are not for our review. This court may not substitute its judgment for that of the ALJ, **see O'Keeffe v. Smith, Hinchman & Grylls**

Assoc., Inc., 380 U.S. 359, 363 (1965).

Meehan's argument that the ALJ erred in finding that it did not rebut the Section 920(a) presumption is denied.

WAGE CALCULATION

Meehan argues that the ALJ erred in calculating Hizinski's average weekly wage pursuant to 33 U.S.C. § 910. Meehan argues that since Hizinski's 1989 tax return showed gross earnings of $5,287.05 that this amount should have been divided by 52 in accordance with 33 U.S.C. § 910(d) to arrive at an average weekly wage of $101.67.

Title 33 U.S.C. § 910 provides, in pertinent part, as follows:

> Except as otherwise provided in this chapter, the average weekly wage of the injured employee at the time of the injury shall be taken as the basis upon which to compute compensation and shall be determined as follows:
>
> (a) If the injured employee shall have worked in the employment in which he was

working at the time of the injury, whether for the same or another employer, during substantially the whole of year immediately preceding his injury, his average annual earnings shall consist of three hundred times the average daily wage or salary for a six-day worker and two hundred and sixty times the average daily wage or salary for a five-day worker, which he shall have earned in such employment during the days when so employed.

(b) If the injured employee shall not have worked in such employment during substantially the whole of such year, his average annual earnings, if a six-day worker, shall consist of three hundred times the average daily wage or salary, and, if a five-day worker, two hundred and sixty times the average daily wage or salary,

which an employee of the same class working substantially the (c) If either of the foregoing methods of arriving at the average annual earnings of the injured employee cannot reasonably and fairly be applied, such average annual earnings of the injured employee in the employment in which he was working at the time of the injury, and of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality, or other employment of such employee, including the reasonable value of the services of the employee if engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee. whole of such immediately preceding year in the same or in similar employment in the same or a

> neighboring place shall have earned in such employment during the days when so employed.
>
> (d)(1) The average weekly wages of an employee shall be one fifty-second part of his average annual earnings. . . .

Title 33 U.S.C. § 910(c) applies to intermittent and irregular employment, when application of mathematical formulas provided in other subsections of Section 910 would be unreasonable or unfair, or when insufficient evidence is presented at hearing to permit proper application of the other sections. **Palacios v. Campbell Industries, 633 F.2d 840 (9th Cir. 1980).** The objective of § 910(c) is to arrive at a sum that reasonably represents a claimant's annual earning capacity at the time of his injury. **Empire United Stevedores v. Gatlin, 936 F.2d 819, 823 (5th Cir. 1991).** In determining earning capacity under Section 910(c), the actual wages earned by the employee are not controlling.

National Steel & Shipbuilding Co. v. Bonner, 600 F.2d 1288, 1292 (9th Cir. 1979). Furthermore, in reviewing rulings of the BRB, which affirmed the ALJ here, this court generally must defer to the Board in its fact-finding capacity, **id., citing O'Leary v. Brown-Pacific-Maxon, Inc., 340 U.S. 50 (1951)**, as well as in its role as interpreter of the Act. **Id.**

In calculating Hizinski's average weekly wage under section 910(c), the ALJ credited Hizinski's deposition testimony that he worked 116 days in 1984, 57 days in 1985, 129 days in 1986, 39 days in 1987, and 88 days in 1988. The ALJ then noted that Hizinski's tax return for 1989 reflects that he earned $5,287.05, which when divided by 43 days worked, would yield a $122.95 daily wage. The ALJ then multiplied the $122.95 daily wage figure by the number of days claimant worked during each of the preceding 5 years, and determined that claimant had average annual earnings for 1984 through 1989 of $9,675. The ALJ then divided this figure by 52 under section 910(d)(1), to obtain an average weekly wage of $186. An ALJ

may calculate average annual earnings under section 910(c) based on a claimant's earning pattern over a period of years prior to the injury, where, as in the case at bar, all of the years within that period are taken into account. **See Empire United Stevedores v. Gatlin, 936 F.2d 819, 823 (5th Cir. 1991).** The calculation by the ALJ of claimant's average weekly wage was reasonable, supported by substantial evidence, and consistent with the goal of arriving at a sum which reasonably represents claimant's annual earnings at the time of his injury. The calculation reasonably took into consideration the number of days that Hizinski averaged per year as a longshoreman and determined an average weekly wage based upon his current daily wage. This method of calculation was not unreasonable. The ALJ did not err in calculating Hizinski's average weekly wage.

PERMANENT TOTAL DISABILITY

Meehan argues under this point that Hizinski was not entitled to permanent total disability because it established

that there were jobs available for Hizinski. A claimant for disability benefits under the LHWCA establishes a prima facie case for total disability by demonstrating his inability to return to his former employ. **See v. Washington Metropolitan Area Transit Authority, 36 F.3d 375, 380 (4th Cir. 1994).** The burden then shifts to the employer to rebut disability by proving suitable alternative employment available upon a reasonably diligent search by the claimant. **Id.** An employer may satisfy this burden by proving that the injured employee retains the capacity to earn wages in regular, continuous employment. **Id.** Relevant factors in this inquiry include the claimant's age, background, employment history and experience, and intellectual and physical capabilities, and the reasonable availability of jobs in the community for which the claimant is able to compete and which he could realistically and likely secure. **Id.**

"[I]n order to defeat a claim for benefits as a result of an alleged permanent total disability, the burden is

on the employer to prove the existence of a suitable job presently available to the claimant in the community in which he lives." **Haughton Elevator Co. v. Lewis, 572 F.2d 447, 451 (4th Cir. 1978)** and **Godfrey v. Henderson, 222 F.2d 845, 849 (5th Cir. 1955).**

Hizinski established that he was not able to return to his job as a longshoreman. The parties then presented conflicting evidence from vocational experts. Hizinski's vocational expert opined that there was no work in the local economy that Hizinski could perform and the ALJ found this evidence to be most credible. Meehan has not shown reversible error by the ALJ in evaluating the conflicting evidence and making credibility determinations.

DELAY IN APPEAL PROCESS

As its final allegation of error, Meehan argues that the delay of over four years from the filing of its notice of appeal from the decision of the ALJ to the issuance of the decision and order of

the BRB was unreasonable and a denial of due process.

At some point a delay in the opportunity for administrative and judicial review can amount to a denial of due process. **See Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 547 (1985).** However, a reasonable delay does not amount to a denial of due process. **See, id.**

In the case at bar, the delay was not unreasonable. Part of the delay of which Meehan complains was as a result of Meehan's prior appeal to this court of the BRB's denial of a Motion for Stay. Additionally, records were lost in transmission by the BRB which caused the records to have to be reconstructed thereby slowing the process. Meehan's argument of denial of due process by the delay before the BRB is without merit.

The judgment of the BRB is affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES

DECISION AND ORDER - AWARDING BENEFITS
JULY 31, 1992
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BENEFITS REVIEW BOARD

DECISION AND ORDER
SEPTEMBER 12, 1996
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In the Matter of

ROBERT HIZINSKI

Claimant

Date:

v. Case No. 90-LHC-3254

OWCP No. 10-12916

AMERICAN GRAIN TRIMMERS, INC.

Employer

and

MEEHAN SEAWAY SERVICE

Employer

and

RAINDLES & HOLBROOK

Carrier

and

DIRECTOR. OFFICE OF WORKERS' COMPENSATION PROGRAMS

Party in Interest

Appearances:

Dean M. Margolis, Esq.

for the Claimant

John A. Mundell, Esq.

for American Grain Trimmers, Inc.

Gregory, Sujack, Esq.

for Meehan Seaway Service

Charles W. Campbell

Administrative Law Judge

DECISION AND ORDER - AWARDING BENEFITS

This proceeding arises out of a claim for disability and medical benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §§ 901 et seq. (the "Act"), and regulations issued thereunder. A hearing was held September 9, 1991, in Duluth, Minnesota, at which all parties were given the opportunity to present evidence and argument.[1]

The record was held open after the hearing for the submission of vocational evidence (Tr. at 22022). Meehan Seaway Service ("Meehan") attempted to submit a report and supplemental letter from Mr. Genereux, identified as Exhibits M 13 and M 14. respectively. By order dated December 26, 1991, these exhibits were

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[1]The following abbreviations will be used to identify exhibits: C-Claimant's Exhibit; A-Exhibit of American Grain Trimmers; M-Exhibit of Meehan Seaway Service; JX-Joint Exhibit; ALJX-Administrative Law Judge Exhibit; Tr.-Transcript of hearing.

excluded from evidence as they did not conform to the form of vocational evidence (a deposition) as permitted at the hearing (Tr. at 220-21). Meehan filed a motion to reconsider the exclusion on December 31, 1991, or, in the alternative, to reopen the record for submission of the deposition of Mr. Genereux. On January 3, 1992, I issued an order denying the request for reconsideration but granting the request for the submission of the deposition. That order also granted permission to the claimant to submit a responsive report from Mr. Jack Casper, the vocational expert who had testified for the claimant.

On March 6, 1992, Meehan submitted the deposition of Mr. Genereux as well as a motion to admit the evidence. On March 20, 1992, the claimant's attorney submitted the report of Mr. Casper as well as additional evidence in the form of certain job logs. Meehan objected to the submission of the logs. By order dated March 31, 1992. I admitted into

evidence the deposition of Mr. Genereux and the deposition correction sheet as well as Mr. Casper's report in its entirety. The order excluded the job logs from evidence. The deposition of Mr. Genereux is designated M 15; the deposition correction sheet is designated M 16; and the report of Mr. Casper is designated C9.

Both the claimant and American Grain Trimmers ("American") submitted post-hearing briefs in this matter. No post-hearing brief was received from Meehan.

ISSUES

There are two employers involved in this case and two alleged injuries: an alleged injury to the claimant's right knee in 1979 incurred while working for American and an alleged injury to the claimant's right knee in 1989 incurred while working for Meehan. As to the claim against American the issues in this case are whether the claimant injured his left knee or his right knee in 1979; whether

the claim is timely; and nature and extent of any disability (ALJX 8). The issue of whether American is entitled to §8(f) relief under the Act was determined in an order issued on May 10 1991, denying relief. The parties agree that American never filed a notice of controversion of the claim; that American paid medical benefits on the 1979 injury; and that American paid temporary total disability benefits for five and four-sevenths weeks (Tr. at 14)

As to the claim against Meehan the issues are whether the claimant sustained an injury on October 14 1989 that arose out of and in the course of employment with Meehan; whether the claimant timely notified the employer of the injury; the claimant's average weekly wage at the time of the injury; and the nature and extent of any disability (Tr. at 12). The parties agree only that the claimant and Meehan were in an employer-employee relationship at the time of the alleged injury and that the Act applies to this claim.

- FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Existence of compensable injury.

1 Summary, of the evidence.

The claimant's deposition testimony was taken on July 31 1991 (A 17). He testified to the following description of his 1979 injury: He was working aboard a ship called the "Balkan" in December of 1979 in Superior Wisconsin (A I 1 at 7-8). He was working for American at the time (A 17 at 7) American had hired eight workers including one walking boss from the local union hall to work on this particular ship (A 17 at 8). He could not remember any of the other workers from that day except for William Nelson or whether he had been called out in the morning or the afternoon (A 17 at 9). He was loading grain aboard the ship and he pulled a spout back and forth over the hatch using a rope (A 17 at 10). Mr. Nelson was on the east side of the hatch and the claimant was on the north on the aft side of the vessel (A 17 at 10). The

accident occurred around 3 a.m. (A 17 at 11). No one else besides Mr. Nelson was in the area (id).

The accident occurred when the claimant was pulling on a line loading the hatch and he slipped on the ice and snow. He fell toward his right twisted his knee and "went down", his right knee hitting the deck (A 17 at 12-13). He rested for a while then continued to load the ship (A 17 at 13). He reported the accident to Bill Barker, the timekeeper for American, but he could not recall filling out an accident report at that time (A 17 at 14-20).[2] He came to work on December

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[2]The accident report itself (which the claimant stated was probably written by him) must have been written sometime after December 11, 1979, and not at the time the accident occurred. Box #12 states that the claimant first failed to report to work on December 9, 1989 (Hizinski Deposition Exhibit 1). Box #24 states that the claimant "told Bill Barker on morning of 8th. No foremen or supervisor was around at time of accident." Box #25 states that the nature of the injury was "left knee, torn ligaments, water developed on knee." This diagnosis could not

9,1979 and worked a full shift, but he did not come in on December 9, 1979 (A 17 at 20). The first physician he saw for treatment was Dr. Scott, who examined him and took X-rays, then referred him to Dr. Budd, who prescribed medication and gave the claimant exercises to perform (A 17 at 21). He stayed off work for three or four weeks, at which time he was given permission to go back to work, but by that time the season was over (A 17 at 22).

The claimant returned to work on March 2, 1980, when he worked for Ceres Terminals (A 17 at 26). The claimant could not recall having any treatment for his knee during the years 1980 to 1985 (A 17 at 26-27). He saw Dr. Moen on January 24, 1986, complaining of pain in his right knee, and he was off work for a few days

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have been made until after the claimant had seen a physician, which was December 11, 1979. Finally, Box #27 states that the claimant was told not to work for at least a week, "which I was unable to already from 12-10-79."

(A 17 at 28).

The claimant also testified at the hearing. He stated the following history of his knee injury in 1979: he was working on a vessel called the Balkan on December 7, 1979, loading a hatch (Tr. at 94). He was on the aft end of the ship, and his co-worker, William Nelson, was on the dock side of the hatch, about 25 feet away (Tr. at 94). The claimant was pulling a pipe over the hatch by pulling on the ropes attached to the pipe when he slipped on the deck, which was covered with ice, snow, and grain (Tr. at 95). He fell and hit his right knee (Tr. at 95). He was positive it was his right knee because that is the knee that has always bothered him ever since 1979 (Tr. at 95). He reported the injury to the timekeeper for American, Bill Barker, on December 8 (Tr. at 96). He waited until the next day to report it because the injury occurred about 2:00 a.m., and there was no one around to whom he could report it (Tr. at 96). He did not recall having filled out an accident report (Tr. at 96). He stated

that if he did fill out the accident report that was included as a part of the record, he stated that "it [was] as if I copied a doctor's report. I wouldn't know if I had water developed on the knee, or what" (Tr. at 96). He also stated that he had been working many hours in a row and that he might have been tired when he filled out the report. He stated, "So, if I said left knee, that was an honest mistake. And, I was tired. I can't explain why that says left knee, other than that" (Tr. at 97).

William Nelson testified at the hearing. He stated that he was working with the claimant on December 7, 1979 when the claimant suffered an injury (Tr. at 60-61). He stated that they were loading grain by moving the spouts back and forth over the hatch (Tr. at 61). The claimant was opposite Mr. Nelson, pulling on the ropes (Tr. at 61). Mr. Nelson stated that the deck was slippery that day (Tr. at 61). He also stated that he remembered the claimant slipping and falling on the ice (Tr. at 62). When asked which side

the claimant fell on, Mr. Nelson answered, "When I seen him going down and I come over there, he was on his right side" (Tr. at 63). He told the claimant that if he had hurt his knee he should make out a report and turn it into the boss (Tr. at 63). He testified that the usual practice was to make a report to the walking boss as well as to the union Local when a worker had sustained an injury (Tr. at 68-69). The walking boss would then usually report it to the company. The Local makes a note of it in its own books, "for future reference" (Tr. at 69).

American's first report of the accident was an undated, typewritten form that stated that the claimant began working at 8:00 a.m. and that he was injured at 2:00 p.m. (A 1; C 6). It further stated that the claimant did not stop work immediately, and that he first failed to return to work on December 9, 1979, at 8:00 a.m. The description of the accident on that form states "Handling a line to pull the pipe over when I slipped on deck

bancing [sic] and twisting my knee. There was ice and snow plus wet flax all over deck." The nature of the injury was listed as "Left knee, torn ligaments, water developed on knee." The report stated that the claimant was provided with medical attention on the day of the accident by Dr. Scott of the East End Clinic. The form was signed by "Joy Oaks, Paymaster."

The parties stipulated that Ms. Oaks would have identified the original accident report that the claimant had completed, and that the procedure normally followed was to have the worker fill out an accident report, which would then be re-typed by the office and sent to the Department of Labor (Tr. at 117). Angus MacLeod would also have testified that the injured worker would be given the form, to fill out, and then the form would be turned in to the office (Tr. at 118).

Dr. Malcolm Scott's office notes show that he saw the claimant on December 11,

1979 (A 3). The typewritten portion of his notes states that the claimant suffered "[p]ost traumatic effusion of the left knee with negative x-ray findings." Dr. Scott stated that there were no symptoms of locking. He stated that "this" developed gradually after a knee injury at work. Dr. Scott treated him with medication (butazolidin) and stated that he did not feel that the degree of effusion necessitated aspiration at that point butt "if it [the knee] didn't go down that aspiration would have to be done." Handwritten above that entry in Dr. Scott's notes it states "(slipped & fell at work on 12/9/79). The words "Comp - Arn. Grain Trimmers" were also written there.

Dr. Scott's notes show that he again saw the claimant on December 14, 1979 (A 3). Dr. Scott stated that there was "[r]esolving effusion of the left knee," and that it was 50% better than the last time he had seen the claimant. Dr. Scott discussed various quadricep muscle exercises with the claimant and stated

that the claimant was not ready to return to work. On the entry for December 19, 1979, the words "appt. Dr. Budd Friday Dec 21 10:00" were handwritten. The typed entry for that day stated that the claimant was having symptoms of knee joint instability with some locking usually! when the knee was partially flexed. Dr. Scott stated that the effusion of the joint had subsided markedly "but because this [was] an industrial thing and it [had] become progressively more uncomfortable," Dr. Scott referred him to an orthopedic surgeon . Dr. Scott's records show that he examined the claimant for other complaints on November 10, 1980, and January 26, 1982 without any inclination that the claimant mentioned his knee.

Dr. Budd's office notes show that he first examined the claimant on December 20, 1979 (A 4; C 1B). Dr. Budd stated that the claimant slipped on the deck of an ore boat and twisted his knee and hit it on the deck on December 7, 1979. Dr. Budd stated that the claimant's knee

became swollen a few days later. On examination Dr. Budd noted that "[t]he left knee is cool not swollen and there is no effusion. He has full range of motion. Negative Spring sign. Negative Murray. The ligaments are stable." Dr. Budd stated that the X-rays of the claimant's knee were satisfactory and showed no damage.) He stated an impression of a contusion of the knee and showed the claimant some exercises to perform. In a letter dated December 20, 1979 to Dr. Scott, Dr. Budd stated that he felt that all the claimant needed was quadricep exercises and that the claimant had a stable knee (A 5).

Bill Finnelly, an insurance claims investigator for Midland Insurance Co. in 1979 at the time of the claimant's injury took notes during a conversation on January 3, 1980 with the claimant regarding the claim. Those notes (A 10) show that the claimant reported that he had slipped on flax while pulling a pipe and had twisted his left knee. These notes state that the claimant was

examined by Dr. Scott on December 10 or 11, 1979 and that the claimant was thereafter sent to Dr. Budd on December 21, 1979. Mr. Finnelly noted that "Dr. Budd told [the claimant] that he had a sprain of the left knee." On January 18, 1980 Mr. Finnelly stated in a letter to Gretchen Campbell of Midland Insurance Co. that the claimant had contacted his office on January, 10, 1980, and stated that he had been released to work effective that day. Mr. Finnelly stated that the claimant had sustained a severely sprained left knee but that there was apparently no damage done to the cartilage or ligaments. He stated that the claim was a compensable Longshoremen's claim. The claimant testified at the hearing that he did not recall being contacted by Mr. Finnely.

The phone conversation that allegedly took place between the claimant and Mr. Finnelly was supposedly recorded but the recording was not produced. The parties stipulated that the original cassette recording of the conservation between Mr.

Finnelly and the claimant could not be located (Tr. at 116-117).

Dr. Scott completed a workmen's compensation commission physician's report dated January 16, 1980 (A 6). On that form, Dr. Scott stated that the claimant had slipped and fallen at work, and he stated his findings as follows: "post traumatic effusion of left knee. Contusion of left knee." He stated that he anticipated no permanent injury to the claimant's knee. He recommended no rehabilitation and stated that the claimant had been referred to an orthopedic surgeon Dr. Budd.

On October 11, 1985 the claimant apparently wrote a letter to the department of Labor (M 11). He stated that on December 7, 1979 he injured his knee in a work related accident. He then stated that "[t]hat same knee is bothering me more and more and may need surgery." He asked for information regarding his workers' compensation rights and inquired whether he had a

claim for a recurring injury.

Dr. Scott's office notes from January 24, 1986, were included as part of the record (A 7). The notes contained a the handwritten statement: "(Re-injured: old Inj). Inj: 12-7-79 Comp. American Grain Trimmers, Inc. 505: Bd. of Trade Bldg Duluth Mn. Inj Rt. Knee, slip on ice and twisted [knee]." The page also contained typewritten notes which stated that the claimant had had recurring problems with his knee "as noted on the dictation to the state." Dr. Scott stated that an examination showed tenderness over the medial collateral ligaments and that there was no locking. He stated that the claimant needed to consult an orthopedist about his knee. He stated that an X-ray taken that day did not show any problems although there was some narrowing of the knee joint space medially. It was also noted on the page that there was a "Letter to U.[S]. Dept. of Labor enclosed."

Dr. Scott's letter to the Department of

Labor stated tnat the claimant had suffered an injury in 1979 and that since that time the claimant had had intermittent symptoms of joint instability (C 1E). Dr. Scott stated that there was no need for surgery in 1979 but that the claimant's symptoms had grown progressively worse. He stated that the claimant "most likely" had an "internal derangement of the knee joint as a result of his industrial accident and will require orthopedic follow up and possibly surgery."

The medical records of Dr. Clint Moen were included as part of the record (A 8; M 12 at 34). Dr. Moen's notes show that the claimant was referred to him, by Dr. Scott. The first entry was dated February 7, 1986. The claimant informed Dr. Moen that in 1979 he had slipped on a boat and strained his right knee. The claimant stated that since that time he had had increasing discomfort over the medial side of his knee. Although he had no swelling buckling or locking problems, the claimant did report that when he

shuffled from right to left there was a catching sensation and that this sensation caused quite a bit of pain.

On examination of the claimant Dr. Moen stated that the claimant exhibited good range of motion. He stated that the only tenderness he noted was over the adductor tubercle at the insertion of the abductors and that the claimant's X-rays were unremarkable. He stated that there was no evidence of ligamentous instability. Dr. Moen stated that at that time he thought the claimant had chronic bursitis over the adductor tubercle. He prescribed medication (Indomethacin and stated that if the medication were not helpful he would suggest local injection over the point of maximum tenderness. If that also did not relieve the claimant's condition Dr. Moen indicated that the claimant might be a candidate for arthroscopy.

The claimant wrote another letter to the Department of Labor on March 10, 1986 (M 10). In that letter the claimant stated

that he had not reinjured his knee or any part of his knee since his original injury in 1979. He stated that if it had been reinjured he would have reported it "as each injury should be, like I did originally." He stated that his knee had been bothering him, recently and seemed to have gotten worse in the last year. He indicated that before seeking medical treatment he called Angus MacLeod of American who apparently informed the claimant that-American would "honor the 1979 injury . . . ." He stated that Dr. Moen prescribed some medication that seemed to be helping but that the claimant might need cortisone shots or surgery.

The parties stipulated that Angus MacLeod would have testified at the hearing that American paid for the claimant's treatment for his knee in 1986 because Mr. MacLeod and the company believed that it was the claimant's left knee that he had reinjured (Tr. at 119).

Dr. Scott wrote a letter dated June 24

1986 to John Sheather, then the operations manager for American (A 9). In that letter Dr. Scott stated in part:

> I am writing to clarify your questions as to Robert Hizinski's re-injury claim of January 24, 1986. Apparently there is a discrepancy in our recorded medical record regarding Mr. Hizinski's original claim following an injury in 1979. I have reviewed our records and the x-ray films (knee) on file and feel that the x-ray film taken in 1979 was mismarked as to which knee. The injury involved the right knee; however the x-ray film was marked left and all documentation thereafter was taken from the x-ray film's identification.
>
> This letter is to verify that Mr. Hizinski's recurring problem is with the right knee which is the site of the original injury.

(A 9) (emphasis in original).

At the hearing, the claimant stated for the first time that his wife worked in the same clinic where Dr. Scott worked (Tr. at 165). He stated that his wife came home from work one day and informed him that the X-ray from his old injury was labeled left knee instead of right knee. (Tr. at 165). When he became aware of the X-ray being labeled left instead of right he "wanted something done about it because it was not the left knee that was injured" (Tr. at 165-66). It was around that time that Dr. Scott wrote the letter regarding the alleged mix-up in the X-ray labeling (Tr. at 166).

The claimant continued to work as a longshoreman doing heavy work until 1989 (Tr. at 99-100). During that time he had many problems with his knee such as aching in the inside of the right knee and pain for several days at a time (Tr. at 100-01). He had to take many days off work because of the pain in his knee (Tr. at 101). Other injuries that the claimant incurred while working between 1980 and 1989 included a left calf injury

in 1987 (A 17 at 28), for which he was off about eight days (A 17 at 29). When the claimant had on-the job injuries such as when he hurt the tendon in his leg when he stepped on a nail and when he got something in his eye he would report the injury to the lead man or walking boss (A 17 at 61-62). The claimant stated that sometimes he was told to go to the doctor for his injury and sometimes he would go if he thought he needed to whether he was told to or not (A 17 at 62).

In his deposition the claimant related the history of his 1989 injury. He stated that on October 14, 1989 he was working for Meehan at the Port Terminal loading 110 pound bags of grain (A 17 at 30-31). He stated that at that time he reinjured his right knee when he stepped into a crevice between other bags that had been laid in the hold of the ship (A 17 at 30). Another employee Greg Fisher was present when the accident occurred (A 17 at 32). The claimant could not recall any other employees who worked that day (A 17 at 49). He stopped working because he

felt an intense pain in his knee. The accident occurred around 4:00 p.m. but the claimant continued to work until 5:00 p.m. (A 17 at 31), throwing down a couple of bags (A 17 at 56). He reported the accident to the walking boss George Petrovich, but he did not fill out an accident report (A 17 at 31). He did not return to work after that day (A 17 at 32) and he did not tell anyone else about it (A 17 at 60).

The claimant also testified at the hearing regarding the 1989 incident. He stated that on October 14, 1989 he was working for Meehan carrying 110-pound bags in the hold (Tr. at 102). He had done this work several days that week. He was carrying a bag to stow it when he stepped into a crevice or gap between the bags in the hold (Tr. at 103). Although the accident occurred at 4:00 p.m., he stayed on until the end of his shift throwing bags in low spots (Tr. at 103-04). He informed George Petrovich, the walking boss, about the incident and stated that he would probably not be back

to finish the shift, (Tr. at 105). He did not recall whether Mr. Petrovich told him to fill out an accident report but stated that he did not fill one out because he "attributed it to [his] American Grain injury" (Tr. at 105). The claimant had been off work because of his knee before, sometimes for several days. He knew, however, on the 14th that the pain was substantially different (Tr. at 188).

He did not return to work because his knee was bothering him (Tr. at 105). He never returned to work after that (Tr. at 105).

At the hearing the claimant stated that he saw Dr. Moen on November 1, and that it was the earliest date he could get an appointment (Tr. at 106). He stated that he did not inform Dr. Moen about the October 14 injury because Dr. Moen "didn't ask" and because Dr. Moen "rushed [him] in and out of there" (Tr. at 106). In his deposition the claimant stated that although he was in pain after the

alleged injury on October 14, he waited to get medical treatment from Dr. Moen to see if his knee would get better (A 17 at 70).

George Petrovich also testified at the hearing. He stated that on October 14, 1989 he was working for Meehan as the deck boss aboard the Gemini ((Tr. at 73-74). He stated that the claimant was working in the hold of the ship, unloading 110-pound bags of grain and storing it in the hold (Tr. at 75-76). He stated that at the end of the day on October 14, 1989 the claimant came up to him and explained that he had hurt his right knee by stepping in a hole or a crevice (Tr. at 76-77). He stated that he told the claimant to fill out an accident report (Tr. at 76).
The claimant then stated that he did not think that he had to fill out an accident report because it was an old injury that he had received while working for American (Tr. at 77). According to Mr. Petrovich, the claimant stated that he would not be able to work the next day

because of his knee and that he might see a doctor about his knee (Tr. at 77). Mr. Petrovich also stated that over the years he had worked with the claimant, he had seen the claimant limping when he asked the claimant about it the claimant would tell him that it was an old injury that acted up every so often (Tr. at 78-79). It was established that Mr. Petrovich conversed with claimant's counsel regarding his testimony and that he discussed the accident with a private investigator as well as the claimant (Tr. at 79-80). Also when questioned the witness could not recall the ships on which he was working on either the 13th or the 15th (Tr. at 81-82), although he stated in his direct testimony that he recalled that he was working aboard the Gemini on October 14th (Tr. at 74). The witness did state that he remembered the claimant (but not others) working that day because he had known the claimant for several years (Tr. at 84).

The claimant stated that he associated the 1989 knee pain to the injury he had

sustained in 1979 because the pain was similar to the type of pain he stated he had been having off and on since 1979 (A 17 at 70-71). His knee had ached off and on from 1979 getting progressively worse until the accident in 1989; the 1989 injury, was severe (A 17 at 72) and instantaneous (A 17 at 66). The claimant thought that everything that happened to his knee reverted back to 1979 and the original injury (A 17 at 75); that was why after the injury he tried to contact Angus MacLeod at American and have him pay for the treatment (A 17 at 75-76). The claimant stated that he did not know when he developed the belief that Meehan was partly to blame for his knee condition (A 17 at 78).

The next entry in Dr. Moen's notes show that he examined the claimant on November 1, 1989 (A 8). He noted that the claimant continued to have problems with his right knee. The claimant stated that there was no swelling, locking, or buckling but that he had an aching and a sharp pain on the medial side of his

knee. He stated that the medication that Dr. Moen had prescribed in 1986 did not help. Dr. Moen stated that his physical examination of the claimant was "unremarkable." Dr. Moen stated that he could not elicit any area of tenderness and that the claimant's range of motion was good. He recommended that the claimant have an MRI (magnetic resonance imaging) performed.

The claimant had an MRI examination on November 3, 1989 (A 13 at 4; M 12 at 5). The claimant informed the examiner that he had had an injury to his right knee in 1979 and that his symptoms had been getting worse since that time. The examiner, F. E. Eckberg M.D., interpreted the MRI as showing extensive complex tearing involving the posterior horn and mid portion of the medial meniscus; small knee joint effusion; and very small benign subchondral cyst arising from the mid portion of the proximal tibia (A 13 at 4).

The next entry in Dr. Moen's notes is

dated November 9, 1989. Dr. Moen stated that the claimant's MRI results showed that he had a medial meniscal tear and would benefit from surgery. The claimant indicated that he would elect a time to have surgery when his cardiovascular status stabilized. Dr. Moen repeated the diagnosis and recommendation in a letter to the claimant dated November 9, 1989 (A 13 at 6).

The claimant wrote a letter to the Deputy Commissioner sometime in 1989 (M 9). The letter is dated only "1989" but states that the claimant had an MRI scan on November 3, which shows that the letter was written after the claimant's alleged accident on October 14, 1989 and after his examination by Dr. Moen. The letter does not mention an accident on October 14, 1989. The claimant stated only that the letter was concerning "the same knee injury that occurred on the job in 1979, which has never been re-injured but has gotten progressively worse." The claimant also stated in that letter that the last time he went to a doctor for his

knee was in 1986 when "it was ruled that" American was responsible for his medical treatment. The claimant also stated that he had contacted Angus MacLeod of American and explained about his knee problems. In this letter the claimant repeatedly refers to his contacts with his employer, American regarding his MRI scan, the results of the scan, and his inability to return to work. The claimant also remarked that for a time in October he could only work 4 hours before he would have to quit for the day on account of his knee.

At the hearing the claimant was asked why he stated in his letter that the he had not reinjured his knee working for Meehan. He replied "Well I don't know. Like I said, I always maintained this was an original, I have always reverted back to American Grain. I have tried to get my bills paid with it" (Tr. at 110). The following exchange then took place:

> Q All right. Why did you say that you had not reinjured your knee

though, when you did?

(Pause.)

A I don't know. I didn't consider it.

Q Do you understand what a new injury is?

A I'm not sure what you mean. New injury, or reinjury.

Q Do you understand what a reinjury is? Let the record reflect the witness is unable to answer the question.

A When you hurt an original injury again.

(Tr. At 110-11). When asked again later in the hearing why he did not mention the injury at Meehan the claim, form and why he told the Department of Labor that he had not reinjured his knee the claimant stated "I didn't want to push it with

Meehan. I went for the original injury. I always considered this the original injury no matter what happened to this knee" (Tr. at 215-16).

Dr. Moen wrote a letter to an unknown person on December 29, 1989, in which he stated that the claimant "has an injury to his meniscus in the knee that will require surgery. He states that this originally occurred when he slipped on a boat in 1979. I initially saw him in February of 1986, again his history has been since 1979 having the intermittent pain the knee" (A 13 at 5; M 12 at 2; C 4).

The record contains a copy of a disability claim signed by the claimant and dated February 9, 1990 (M 7). On that form, it was stated that the claimant's disability was due to an accident on December 7, 1979, when the claimant slipped on an ice-covered deck while in the employ of American. The accident statement also indicates that the claimant "consulted Dr. Moen in 1986/1989

for same injury."

The claimant underwent arthroscopy and medial meniscectomy of the right knee on February 8, 1990. The surgery was performed by Dr. Moen (A 13 at 3). After the claimant's surgery, Dr. Moen stated that the claimant was walking with a cane and doing quite well and would be rechecked in two weeks (A 13 at 2). On February 26, 1990. Dr. Moen stated in his office notes that the claimant's Knee swelling was down, but he was getting a catching sensation in the front of the knee and some joint line tenderness but that the knee was better than it was prior to surgery. Dr. Moen noted that "[t]here is some question whether he will be able to return to his work as a longshoreman."

On March 5, 1990, Dr. Moen wrote a letter to Ms. Janet Carr of Principal Mutual Life Insurance Co.. enclosing his office notes (A 13 at 7). Dr. Moen stated in his letter that the claimant's diagnosis at that time was a torn medial meniscus

that had been surgically removed. He stated that the prognosis for full use of the leg was good, although there would be a permanent, partial whole body disability of 2 to 5 percent. He stated that the claimant should avoid stairs and ladders and would be unable to work on scaffolding above six feet high. Dr. Moen further stated an opinion that "the [claimant] would benefit from being retained to a job that did not require standing, pushing, or pulling heavy loads. Dr. Moen stared in closing that he felt that the claimant's knee condition would stabilize and that the claimant could return to full unrestricted weight bearing with no squatting, deep knee bends, or kneeling.

On March 9, 1990, counsel for the claimant sent a letter to American's insurance carrier, Wausau Insurance Co., in which he stated that the claimant's recent arthroscopic surgery was necessitated by "his injury of December 7, 1979," and he requested that weekly compensation benefits be paid (M 2).

The next entry in Dr. Moen's notes is on March 26, 1990 (A 13 at 2). Dr. Moen stated that the claimant was still having pain in his knee and a feeling that the medial side was separating. Dr. Moen explained that "with the degenerative flap . . . this can take some time." Dr. Moen also stated that at that time, the claimant did not feel that he would be able to return to "his previous level of employment." Dr. Moen stated, "I would concur at this time and will see him back in two months." Dr. Moen's office notes from June 20, 1990 (the next entry in his record), indicated that Dr. Moen had evaluated the claimant's disability at 5%, and the claimant apparently thought his disability should be greater. Dr. Moen stated that under the Minnesota and Wisconsin disability ratings the claimant's disability could not be extended beyond 5%.

In a letter dated April 18, 1990 Dr. Moen summarized his treatment of the claimant in 1986 and 1989. He reported that he had initially seen the claimant in 1986

when the claimant stated that he had slipped on a boat in 1979 and strained his right knee. Dr. Moen stated that the claimant had informed him that he had had right knee pain on and off since that time with occasional catching sensation. In 1989 the claimant had stated that his pain had worsened. He stated that as of April 1990 the "customary disability rating on a patient with this type of injury is 5 percent permanent partial disability . . ." (M 12; C 4).

The claimant filed an amended claim for compensation on May 9, 1990 (C 4). In an accompanying letter counsel for the claimant stated that the "Amended Claim for Compensation is for benefits from both the injuries of 12-8-79 [sic] and 10-14-89, and in the alternative, for either work injury in the event that the claim for one of these work injuries is denied" (M 5). The caption of the letter included Meehan as employer as well as American.

The claimant's attorney wrote a letter to

James Stamper a claims examiner for the Department of Labor dated June 11, 1990 (M 6). The letter was in response to Mr. Stamper's earlier statement to counsel that the claimant should choose which insurance company he was "going after" (Tr. At 24). The claimant's attorney submitted certain letters and medical documents. The claimant's counsel also explained the basis for the claimant's amended claim for compensation filed on May 9, 1990 (included in C 4). Counsel for the claimant stated that on October 14, 1989 the claimant was working aboard a cargo ship and was unloading 110-pound bags of grain (M 6). There were eight men in the hold unloading the grain and each man pulled a bag from the pallet over to the ship side. Counsel for the claimant stated that the "task did not involve anything else other than lifting and carrying heavy bags. Mr. Hisinzki's right knee did bother him after finishing this work on October 14, 1989. However, his knee did not bother him [any more] than it had on previous occasions ever since his "work injury in 1979." Counsel

for the claimant further stated:

> Mr Hizinski further advises that he did not sustain any re-injury to his right knee while working for Meehan Seaway Service, Ltd. in October 1990. Further after having an opportunity to think the situation over Mr. Hizinski believes that the work he did at Meehan's Seaway, Service Ltd. on or about October 14, 1989 was a temporary aggravation or exacerbation of his knee condition which has plagued him ever since his 12-7-79 work injury.

(M 6) (emphasis in original). In that letter, counsel for the claimant also stated that the claimant was not working at that time because his knee was as bad as it had been before the surgery was performed. Counsel clarified that the claimant was seeking benefits from American.

Informal conferences were held on this claim on June 6, 1990 and on June 19,

1990, between the claimant and the carriers for the employers (C 5). The claims examiner James Stamper, issued a final recommendation on August 16, 1990, in which he stated that the claimant injured his right knee in 1979 and that the claimant had not suffered a second accident in 1989 while employed for Meehan (C 5). He found that the claimant was entitled to benefits.

In a letter dated March 22, 1991, written to American's attorney, Mark Engasser M.D., stated that he had reviewed certain X-ray films of the claimant's knees (A 15). Dr. Engasser stated in part:

> These films include an AP x-ray of both knees dated January 24, 1986, as well as two separate films, one an AP (front view) and the other a lateral (side view) of the left knee dated December 10, 1979. I feel that the 1986 film is self-explanatory. The 1979 film clearly indicates a left knee marker in both the AP and lateral planes.

> It is my opinion that these are indeed left knee films. The chance of a mis-labeling is made less because of the fact that the AP and lateral are done on separate films and mistakes would have been made on each film for there to have been an error in labeling.

The claimant was examined on March 26, 1991 by Duane F. Person M.D. (A 14; C 1A). The claimant related a history of difficulty with his right knee which began following an injury in 1979 while working for American. The claimant stated that he was loading a grain ship when he slipped on the ice and snow and sustained an injury to his right knee. After that, the claimant stated that he had difficulty on an ongoing basis with his right knee. He stated that they progressed over a period of time and when they were significant enough he saw Dr. Moen. At that time he was treated with medication and rest.

The claimant informed Dr. Person that he

continued to have difficulty and then on October 14, 1989 the claimant again injured his knee while at work. He was carrying 110-pound bags as part of unloading the ship and his symptoms seemed to be worse. He saw Dr. Moen and then had an MRI. Subsequently he had surgery on his knee for a medial meniscal tear. Dr. Person also reported in his letter that at the time of the claimant's surgery it was discovered that he had some fissuring and cracking of the patella. The claimant stated that the surgery was helpful for awhile but that his symptoms returned and at the time of the examination by Dr. Person the claimant stated that his knee was almost as bad as it was prior to surgery.

The claimant informed Dr. Person that he had aching and sometimes sharp pain on the right side of his knee but no swelling or stiffness. The claimant stated that there was painful crepitus present in the knee. Although he had no symptoms of locking in the knee the claimant stated that he did have the

feeling that his knee was giving way. The claimant stated that kneeling and twisting were painful.

Upon examination of the claimant's knee Dr. Person noted small wounds consistent with the claimant's arthroscopic surgery. He stated that the claimant's range of motion revealed that flexion was diminished 15 degrees and was painful in the extremes. The claimant had full extension without discomfort. Dr. Person noted medial joint space tenderness generalized crepitus in the knee with flexion and extension, and stable medial and collateral ligaments. He stated that there was no effusion and that drawer sign and Lachman's sign were negative. Dr. Person stated that the X-rays taken that day showed some minimal medial joint space narrowing.

In reviewing the claimant's work history, Dr. Person stated that the claimant worked as a longshoreman and his duties included loading and unloading ships; lifting, carrying and throwing 110-pound

bags; climbing gangways; and manipulating chutes with rope. This job entailed a lot of twisting crouching standing bending climbing lifting pushing and pulling. Dr. Person also stated in his report that he reviewed the claimant's medical records from Orthopedic Associates in Duluth, MRI Duluth, St. Luke's Hospital and Mariner Clinic.

Based on his evaluation of the claimant and the histories he obtained, Dr. Person concluded that the claimant suffered a tear of the medial meniscus of the right knee necessitating surgical removal. Dr. Person stated that he also had chrondolomalacia of the patella of the right knee. He stated an opinion that the claimant was unable to return to his usual longshore employment at that time. He also stated an opinion that the claimant should not extensively walk up and down gangways or inclined surfaces or ladders no more than once per hour. He could not go up or down more than 20 feet. Dr. Person stated that the claimant should not do repetitive

crouching or lifting using his right leg; should not lift more than 40 pounds using both legs or more than 10 pounds using only his right leg. Dr. Person also stated that the claimant should not do any type of work that involved repetitive flexion or extension of the right knee.

Dr. Person stated an opinion that the claimant had a permanent partial disability of his right lower extremity due to "the problem identified in the right knee area." He stated that the claimant's problems in his right knee were caused by his injury of December 7, 1979, and aggravated by the injury of October 14, 1989. He stated an opinion that half of the claimant's present disability was due to the first accident and half to the second accident. Finally, he stated that the medical treatment that the claimant received since November 1989 was necessary and reasonable for the treatment of his work-related injury (EX 14).

Dr. Moen again examined the claimant on

April 1, 1991 (C 1B at 13). Dr. Moen stated that the claimant continued to have problems with pain in his knee and a constant ache. He stated that the claimant's knee would collapse several times a day especially when going up and down steps. On examination, Dr. Moen noted no gross instability but diffuse tenderness around the joint line and he noted that the X-rays were "undramatic." He indicated that the claimant seemed to be having a lot of pain and that "if his activities are as limited as he describes he certainly would have a difficult time doing heavy labor type work."

On April 22, 1991 Dr. Moen stated that the claimant's restrictions were permanent and that his knee condition would not change in the future nor would his restrictions or his degree of permanency (C 1B at 22).

On May 30, 1991 the claimant was examined by Dr. Engasser (A 19). The report filled out by Dr. Engasser stated at the top: "DATES OF INJURY 12/07/79,

10/14/89." Dr. Engasser reported the following history of the claimant's injuries: the claimant worked as a longshoreman for 30 years until October 14, 1989. He had two injuries to his knee, the first on December 7, 1979 when he slipped on the deck of a ship that was covered with ice and snow and fell. The claimant denied any injury to or problem with his left knee. The claimant was off work for approximately five weeks. The claimant stated that "the symptoms resolved completely and he completely forgot about the injury for a number of years." He began to have some discomfort in the medial aspect of the knee that became worse over time. In 1986 Dr. Moen placed the claimant on anti-inflammatory medication, but the claimant stated that it did not help.

The claimant informed Dr. Engasser that the second injury occurred on October 14, 1989, when he was carrying a 110-pound grain bag. While walking on other bags of grain, he stepped between them and twisted his knee. After seeing Dr. Moen

he underwent an MRI which revealed a tear of the medial meniscus. He underwent partial medial meniscectomy on February 8, 1990. The claimant stated that after the operation he was told that he could not return to longshore work. The claimant told Dr. Engasser that he did not believe that the surgery helped his knee. At the time of the evaluation the claimant stated that he continued to have pain in his right knee but was currently undergoing no specific treatment or taking any medication. The claimant stated that he walked a little and used a ski machine.

After reviewing the claimant's previous medical records, Dr. Engasser stated that the claimant was evaluated three times at the Mariner Medical Center. Dr. Engasser stated that the description of the treatment at the time was to the claimant's left knee and not his right knee. When the claimant was examined by Dr. Budd on December 20, 1979 "the examination was to the left knee and the [claimant] was felt to have a contusion."

The claimant's complaints at the time of his examination by Dr. Engasser included a constant aching in the knee as well as the popliteal area. He stated that his right leg was generally weak and that he had a numb sensation along the medial aspect of the right calf Dr. Engasser, noted that the claimant w as able to mow his lawn and do dishes. The claimant stated that his right knee had given way three times since his injury in 1989 and that his knee would lock at times. The claimant reported problems kneeling, squatting, crouching, standing, and walking more than one mile, but stated that he could go fishing and had no problems sitting.

On physical examination of the claimant Dr. Engasser stated that the claimant was able to ambulate without a limp and was able to get on and off the examining table without difficulty. Examination of the claimant's right knee revealed well-healed right knee arthroscopy incisions and no evidence of effusion. Dr. Engasser stated that the range of

motion in the right knee was from 0 degrees to 140 degrees. He stated that in extension and at 30 degrees flexion there was no evidence of collateral laxity. The Lachman's test and the anterior drawer sign were negative and there was no evidence of anterolateral rotatory instability in the right knee. Dr. Engasser stated that the claimant described some medial paraputellar pain in the popliteal area without evidence of a popliteal cyst. Dr. Engasser noted no evidence of patello-femoral crepitation, pain, or malalignment; no pain over the right tibial tubercle or patellar tendon. Dr. Engasser diagnosed a tear in the right medial meniscus status post partial medial meniscectomy.

Dr. Engasser further stated that the medical records reflected that the claimant injured his left knee and not his right knee in 1979. He stated "I have previously reviewed x-rays labeled left knee from December 10, 1979. There is a left knee marker in the AP and lateral planes. I have also reviewed

films dated January 24, 1986 which is an AP x-ray of both knees." Dr. Engasser described the claimant's present symptoms and knee condition and stated that objective examination of the claimant's knee exhibited no evidence of ligamentous instability. The examination showed no signs of swelling although the claimant had definite pain medially as well as anteriorly and posteriorly. Dr. Engasser stated the following conclusions:

Based on the aforementioned medical facts it is my opinion that Mr. Hizinski is not temporarily or permanently totally disabled due to his injury of October 14, 1989. The patient would be able to perform many types of physical activity including medium work. I feel that he would not have any limitation with regard to sitting and certainly could stand and walk four hours each in an eight hour day. The patient would have a 34 pound weight lifting and carrying restriction with no kneeling or crawling. He could perform no ladder climbing but could perform occasional stair climbing. It is

my opinion that the patient was temporarily totally disabled from October 14, 1989 until six weeks following his surgery. I feel that at the time he could have performed work within the limitations I have preciously given. I do not feel the patient is in need of further medical care. The arthroscopy report did not indicate any evidence of significant degenerative change. If I assume that Mr. Hizinski did injure his right knee on 12-7-79 instead of his left knee, I do not feel that this injury constituted a substantial contributing cause of his right knee problems in 1989 which led to his surgery on 2-8-90. Obviously the patient was able to perform, very heavy work activity for a period of ten years and I do not feel that the severity of the injury and need for subsequent treatment suggested any major pathology which would have anything to do with the problems in 1989 or surgery in February 1990. I feel that the medical records from two different practitioners would have documented that the original injury in 1979 was to the

left knee and not the right knee. I feel that it would be unusual for two practitioners to have made a mistake in terms of dictating the incorrect side. It is my opinion that Mr. Hizinski would have a 7% permanent partial physical impairment of the right lower extremity.

Dr. Moen stated in a letter to claimant's counsel on July 23, 1991, that he could not "elucidate the right knee vs. left knee injury and date of injury any. This is all a matter of record and I do not think that my history would change this confusing history." He also stated that the claimant would be precluded from returning to longshore work "because of the degenerative arthritic condition in his right knee and the persistence of pain and swelling when he does any type of even moderate walking, climbing, kneeling, or bending" (C 1B at 23).

Dr. Moen saw the claimant on July 29, 1991 (C 1B at 14). He remarked that the claimant's complaints were unchanged,

that he still had a significant amount of pain when he did any heavy labor, and that his activities were limited. Dr. Moen stated that at that time he did not think that the claimant's condition would have any substantial improvement.

On a prescription slip, Frank Budd, M.D., wrote: "This is to verify that I did evaluate Mr. Robert Hizinski's left knee on 12-20-79. I did not evaluate his right knee." This slip was dated November 5, 1991 (A 16).

2. Discussion.

The first issue to be decided is whether the claimant injured his left knee or his right knee in 1979. The claimant alleged that although the records from his injury in 1979 indicated that he had injured his left knee, he actually injured his right knee. The claimant stated that he was sure it was his right knee because that was the knee that had always bothered him. In 1986, Dr. Scott submitted a letter stating that he believed that the

X-ray of the claimant's knee in 1979 had been mislabeled and that the injury was actually to his right knee. He stated that "all documentation thereafter was taken from the x-ray film's identification" (A 9).

The evidence shows that after 1979, whenever the claimant mentioned or sought treatment for his knee problems, he always stated that he had had an original injury to his right knee in 1979 that had gotten worse over time. See, e.g. M 11 (10/11/85 letter to the Department of Labor); A 7 (Dr. Scott's office notes. 1/24186; reflect that claimant reinjured old injury); A 8 Dr. Moen's office notes, 2/7/89; indicate that claimant first injured right knee in 1979 and injury had gotten worse). The claimant also stated in a letter in 1986 to the Department of Labor that he had not "reinjured" his knee, and that if he had he would have reported it. In that letter, the claimant stated that his knee had been bothering him "recently" and seemed to have gotten worse in the past year. Mr.

Petrovich, the claimant's co-worker, also stated that over the years he had worked with the claimant, he had noticed the claimant limping. He stated that the claimant always told him that is was an old injury that acted up every so often.

There is considerable documentation in the record that establishes that the claimant injured not his right knee but his left knee in 1979. First, Dr. Scott may be correct that his documentation of the claimant's injury was taken from the allegedly mismarked X-rays during the claimant's first visit on December 11, 1979. However, Dr. Scott also performed a physical examination of the claimant on December 14, 1979, and he stated that there was "[r]esolving effusion of the left knee" (A 3) (emphasis added). It seems impossible that Dr., Scott having examined the actual injured knee would have taken the documentation of which knee the claimant injured from the X-ray on that date. Surely Dr. Scott knew whether he examined the claimant's right knee or left knee.

Moreover, the claimant was also examined by Dr. Budd on December 20, 1979 (A 4). Dr. Budd's office notes state that upon examination of the claimant's injured knee Dr. Budd found that the "left knee is cool not swollen and there is no effusion" (A 3) (emphasis added). There is no indication that Dr. Budd relied on the X-rays of the claimant's knees in stating the results of his physical examination. The chances are very slim that two different physicians who combined for three separate physical examinations of the claimant's knee mistakenly referred to the claimant's left knee instead of his right knee simply because the X-rays were mis-marked. Dr. Budd stated in a note dated November 5, 1991 that he had examined the claimant's left knee not his right knee in 1979 (A 16).

The evidence establishes that the claimant filled out an accident report following his injury in 1979. The report itself shows that the claimant filled it out sometime after he had seen Dr. Scott.

In that report the claimant stated that he injured his left knee. The report lists the injury as "Left knee, torn ligaments water developed on knee" (Hizinski deposition Exhibit 1) (emphasis added). As the claimant pointed out, the description of the injury indicates that the claimant had used a medical report in filling out the form. However, the claimant surely knew which knee he had injured and if the physician's report had been in error he certainly would have indicated on the accident form that he had injured his right knee and perhaps contacted his physician to explain the error. The claimant argued that he had been working long hours and was tired when he filled out the form; in effect that his fatigue prevented him from knowing that he mistakenly wrote "left knee" instead of "right knee." However, as pointed out supra, at footnote 2, the accident report was not filled out at the time of the accident (when the claimant had indeed been working for at least 18 hours straight) but at least after December 11. Thus, when the claimant

filled out the form he had been off work for at least two days, possibly more, and he would not have been so fatigued as to make such a mistake.

There is other evidence that the claimant injured his left knee and not his right knee. American submitted notes prepared by Mr. Finnely, of Midland Insurance Co., recapitulating a statement which he stated he had taken from the claimant by telephone on January 3, 1980, regarding the claimant's injury.

At the hearing counsel for the claimant objected to the admission of the alleged recorded statement taken by Mr. Finnelly (Tr. at 35). Counsel stated that the writing was hearsay, as was the statement contained in the writing (Tr. at 35). Recognizing that the rules of evidence are not strictly applied in administrative proceedings under the Act (see 20 CFR § 702.339), I provisionally admitted the document into evidence. (Tr. at 37-38). I now affirm that prior ruling. Hearsay may be admitted in these

proceedings. Moreover, there is other evidence in the record that corroborates the fact that the claimant's 1979 injury was to his left knee and not to his right knee, and the claimant had an opportunity to cross-examine Mr. Finnelly regarding the writing at Mr. Finnelly's deposition. Finally, I note that the writing may be. admissible under one of the exceptions to the hearsay rule. The statement of the claimant to Mr. Finnelly, considered by itself, is not hearsay because it is a statement of a party-opponent offered against the party. See 29 CFR § 18.801(d)(2); Fed. R. Evid. 801(d)(2). The writing itself has characteristics of both a recorded recollection and a record of a regularly conducted activity (A 18 at 18-19, 29; 29 CFR § 18.803(a)(5) and (6); Fed. R. Evid. 803(5) and (6)). For these reasons, and because the writing has indicia of reliability, the writing is admitted into evidence. The notes taken by Mr. Finnelly in January 1980 indicate that the claimant informed Mr. Finnelly that Dr. Budd told the claimant that he had a "sprain of the left knee"

(A 10) (emphasis added). Clearly, the claimant was not, by that time, relying on a mismarked X-ray in informing Mr. Finnelly as to which knee he had injured.

Dr. Engasser reviewed the claimant's X-rays from 1979 and from 1986 (A 15). He stated that the chance of the X-rays being mislabeled was "made less by the fact that the AP and lateral are done on separate films and mistakes would have been made on each film for there to have been an error in labeling." He stated, "It is my opinion that these are indeed left knee films." In his report of his examination of the claimant, Dr. Engasser stated that the medical records reflected the fact that the claimant injured his left knee and not his right knee in 1979.

Based on all of the evidence, I find that the claimant injured his left knee and not his right knee in 1979. I do not think that Dr. Scott and Dr. Budd would have both been misled by a mismarked X-ray when they both performed physical examinations of the claimant's knee. Dr.

Scott performed more than one physical examination and he filled out a workmen's compensation form stating that the claimant had "Post traumatic effusion of left knee [and] [c]ontusion of left knee" (A 6). Even if, as Dr. Scott stated, all of his documentation of the claimant's injury was taken from the X-rays, this would not account for Dr. Budd's report, or for the accident report that the claimant filled out, or for Mr. Finnelly's documentation, all of which stated that the claimant injured his left knee.

Dr. Engasser's medical examination report shows that the claimant told him that after his injury in 1979, his "symptoms resolved completely and he completely forgot about the injury for a number of years" (A 19). He then began to experience symptoms in his right knee. Perhaps the passage of time and the claimant's development of knee pain similar to that he had experienced in 1979 convinced him that he had originally injured his right knee and not his left.

Also, the claimant stated at the hearing that he was a recovering alcoholic and that he had undergone a 33-day treatment program in June 1981 (Tr. at 115). It may be possible that the claimant's drinking problem affected his memory of the knee injury. While Dr. Scott stated that he believed that the claimant's X-rays had been mismarked, he did not state why he felt that they were. He did not state that he had compared X-ray s taken at that time to present X-rays, or that he recalled having examined the claimant's right knee. For these reasons, I credit the evidence that the claimant's 1979 injury was to his left knee over the evidence from the claimant and Dr. Scott that the injury was to his right knee.

Because the present claim is based on an injury to the claimant's right knee, and the evidence indicates that the claimant's 1979 injury at American was to his left knee, no basis appears for imposing liability on American for the present claim.

The second issue to be resolved in this case is whether the claimant sustained an injury within the meaning of the Act in 1989. The claimant has alleged that on October 14, 1989 he stepped into a hole or crevice in the hold of a ship and injured his right knee.

The claimant alleged that he was working for Meehan on October 14, 1989 unloading 110-pound bags of grain. He stated that in unloading the bags he stepped into a hole or crevice between bags of grain that were on the floor of the hold and twisted his knee. He stated that he dropped the bag he was carrying and caught himself with his hands. He stated that he felt severe pain in his knee at that time. The pain he stated was similar to the type of pain he had had in the past; he also stated the pain at that time was instantaneous and severe. He stated that he informed Mr. Petrovich of the accident but did not fill out an accident report because he thought that everything that happened to his knee reverted back to what he called the

original injury.

Mr. Petrovich testified at the hearing that he remembered working with the claimant on October 14, 1989 and that the claimant told him that day that he injured his knee. He stated that as the lead boss, he was the appropriate person to whom the claimant should report his injuries. He recalled that when he told the claimant to fill out an accident report the claimant stated that he did not believe that he had to because it was an old injury from American.

The claimant did not fill out an accident report even though he had stated in late 1986 that if he had reinjured his knee he would have reported it "as each injury should be like [he] did originally." This is so even though the claimant testified that the pain was severe when he twisted his knee and that it was substantially worse than the previous aggravations of his knee (Tr. at 188).

The claimant first saw a physician after

October 14, 1989 on November 1, 1989 when he saw Dr. Moen (A 8). Dr. Moen at that time noted that the claimant had continuing problems with his knee but he did not note that the claimant had any significant accidents or aggravating events. He scheduled the claimant for an MRI, which ultimately revealed a medical meniscal tear.

After his MRI the claimant wrote a letter to the Department of Labor stating that his knee injury, which he believed at that lime was incurred in 1979, had gotten progressively worse but had "never been re-injured." He also filled out a disability claim form in 1990 that stated that his disability was due to an accident in 1979. He did not mention an injury or reinjury in 1989. The claimant's testimony at the hearing shows that he knew what a "re-injury" meant: "When you hurt an original injury again." He testified that he stated in the letter that he had not reinjured his knee because he always "reverted back to American Grain. [He] always tried to get

[his] bills paid with it." Later he stated that he "didn't want to push it with Meehan'' and that he "went for the original injury."

In March 1990, the claimant, through his counsel, sent a letter to American's insurance carrier in which he stated that the arthroscopic surgery was due to the 1979 injury.

The first recorded mention of the claimant's 1989 accident or injury was in the claimant's May 9, 1990, amended claim for compensation. In that claim the claimant stated that he had sustained two injuries: one when he slipped on the ice injuring his knee and one when he was carrying 110 pound bags of wheat. This form did not state that the claimant had twisted his knee or that he had stepped into a hole between bags of grain, only that he was performing heavy work. The claimant's counsel stated at the hearing that the decision to file the amended claim was made coincidentally at the same time as or shortly after he teamed that

American's insurance carrier was in liquidation (Tr. at 195). The claimant also stated that he knew prior to filing his amended claim that American's carrier was in liquidation (Tr. at 196).

However, after filing this amended claim and adding Meehan as a party, the claimant's attorney wrote a letter to Mr. Stamper of the Department of Labor in which he stated that the claimant did not sustain any reinjury to his knee on October 14, 1989. He stated that the claimant's knee did "bother him" after he finished work, but that it was not any more severe than it had been on previous occasions. He stated that "after having an opportunity to think the situation over," the claimant stated that his work at Meehan on October 14, 1989, temporarily aggravated or exacerbated his knee condition. The letter made no mention of the claimant stepping into a crevice or hole. It emphasized that the claimant was performing his usual tasks and that his knee hurt him in the usual way.

When the claimant was examined by Dr. Person on March 1, 1991, he told Dr. Person that he had hurt his knee in 1979. He also stated that on October 14, 1989, he injured his knee at work. He was carrying 110-pound bags of grain and his symptoms seemed to be worse. The claimant did not tell Dr. Person that he had twisted his knee or that he had stepped into a crevice or hole between bags of grain on the floor.

The claimant was examined by Dr. Engasser on May 30, 1991 (A 19). The claimant stated that he had injured his knee in 1989 when he was unloading bags of grain and he stepped between bags of grain on the floor of the hold, twisting his knee.

At the hearing, the claimant stated that he injured his leg on October 14, 1989, when he stepped into a crevice or hole between bags of grain on the floor of the hold in the ship. He stated that he went forward and dropped the bag he was carrying. He did not state that he twisted his knee, only that in stepping

in the crevice he felt a burning, intense pain (Tr. at 102). In his deposition, the claimant stated that he was carrying a bag when he stepped into a crevice between the bags that had been lain in the cargo hold and he twisted his knee suffering excruciating pain (A 17 at 50).

To recover benefits under the Act the claimant must show that his injury arose out of and occurred in the course of his employment. §2(2). The claimant's is aided in this burden by the presumption in §20(a) which states that "in the absence of substantial evidence to the contrary " it is presumed that the claim comes within the provisions of this chapter." The Benefits Review Board ("Board") has interpreted that section to give claimants the presumption that their injuries arose out of and occurred in the course of employment. See Kelaita v. Triple-A Machine Shop, 13 BRBS 326 (1981); Lacey v. Four Corners Pipeline, 17 BRBS 139 (1985).

To make out a prima facie case and invoke

the §20 presumption the claimant must show the existence of an injury and an accident or a working condition that could have caused the injury. Mock v. Newport News Shipbuilding and Dry Dock Co. 14 BRBS 275, 277 (1981); Blake v. Bethlehem Steel Corp., 21 BRBS 49 (1988); Gencarelle v. General Dynamics Corp., 22 BRBS 170, 174 (1989); Merrill v. Todd Pacific Shipyard Corp. 25 BRBS 140, 144 (1991). The burden then shifts to the employer to produce substantial evidence to rebut the presumption and sever the causal connection between the accident and the injury. Kelaita, supra; Lacey, supra; Rajotte v. General Dynamics Corp. 18 BRBS 85 (1986); Gencarelle, supra.

In this case there is no dispute that the claimant has an injury. The evidence establishes that the claimant had a torn medial meniscus in 1989. To establish his prima facie case the claimant must show the existence of an accident or a working condition that could have caused his injury. In my opinion, while the claimant has not convincingly shown the

occurrence of an "accident" on October 14, 1989, he has shown the presence of working conditions on that date which could have caused his injury.

The claimant has alleged that he reinjured his knee on October 14, 1989 while working for Meehan. The circumstances surrounding this alleged reinjury are not clear. The claimant never even mentioned that an "incident"[3] occurred that could have been considered an accident when he first saw a physician concerning his knee in 1989. In a letter to the Department of Labor the claimant adamantly denied that any such "reinjury" occurred. The first mention of an "incident" on October 14, 1989 was in the claimant's amended claim for compensation. After the amended claim

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[3]I use the term "incident" instead of "accident" or "injury" because the latter two terms are terms of art used in cases arising under the Act. In the context of this discussion, I am considering only whether an incident or event (the claimant's stepping into a hole or crevice and twisting or hurting his knee) occurred.

was filed, counsel for the claimant sent a letter to Mr. Stamper, a claims examiner for the Department of Labor, indicating that such an incident or event did not occur. However, shortly after that letter the claimant informed Dr. Person that he had injured his knee on October 14, 1989. This was the first time that the claimant had informed a physician that he had any injury besides the one he alleged in 1979.

Moreover, the claimant has been inconsistent in relating not only whether something happened on October 14, 1989 but what happened. Initially on the amended claim form and in his conversation with Dr. Person the claimant stated that he was carrying 110-pound bags of grain and felt pain in his knee. There was no mention of stepping in a hole or crevice or of twisting his knee. The claimant stated in his deposition (A 17 at 54) and during his examination by Dr. Engasser that he stepped into the crevice and twisted his knee. He stated at the hearing only that he stepped into

the crevice and that his knee hurt. He did not state that he twisted it.

The claimant's testimony, shows that he knows what a reinjury is: "When you hurt an original injury again" (Tr. at 111). In a 1986 letter to the Department of Labor the claimant stated that at that time he had not reinjured his knee but that if he had he would have reported it. If an incident had occurred on October 14, 1989, that the claimant considered a "reinjury" according to his own definition, I believe that he would have reported it as a separate incident. The medical evidence does not show that the claimant must have hurt his knee in October 1989; Dr. Moen, who diagnosed the medial meniscal tear, attributed the condition to the claimant's supposed injury in 1979. I do not find that there was a specific incident particularly, stepping between the bags and twisting his knee, that occurred on October 14, 1989. The weight of the credible evidence does not support a finding that there was an "accident" on that day.

However, the claimant may still establish his prima facie case if he can show that there were working conditions that could have caused his injury. See Mock, supra; Blake, supra; Gencarelle, supra; Merrill, supra. I note in this regard that the claimant need not prove that the working conditions were the sole cause of his knee condition (which, because of the earlier determination that it was not caused by the 1979 work-related injury, is of undetermined origin); he may establish his prima facie case if he can show that the working condition exacerbated or aggravated his condition. See, e.g. Gardner v. Bath Iron Works Corp., 11 BRBS 556, 565 (1979) aff'd sub nom Gardner v. Director, OWCP, 640 F.2d 1385 (1st Cir. 1980); Pittman v. Jeffboat, Inc., 18 BRBS 212, 214 (1986); Steed v. Container Stevedoring Co., 25 BRBS 210, 215 (1991); Foundation Constructors, Inc. v. Director, OWCP, 950 F.2d 621, 624 (9th Cir. 1991).

In Gardner, supra, the claimant had difficulties with his legs due to

varicosities. These problems were not originally related to any work that he had done. Gardner, supra at 557. The claimant was hired by Bath Iron Works Corp. as a machinist and his job required standing on concrete steel and wooden floors. Id. His leg condition became worse over time and required surgery in August 1971. He returned to work but again began to experience difficulties and had to take time off work. He sought compensation under the Act for his time off work and for permanent partial disability. Id.. at 557-58. The employer argued that the claimant's varicose vein condition was not a compensable injury within the meaning of the Act.

In considering whether the injury was an "accidental injury" within the meaning of §2(2) of the Act, the Board (in a complex and thorough opinion) noted that the injury that the claimant suffered was not a sudden injury but an injury that merely progressed until the period of alleged disability. Id. at 563. While acknowledging that the injury was not

like typical injuries in cases arising under the Act, the Board stated that it could not be disputed that something had happened to the claimant which prevented him from earning wages. The Board then stated "If what happened was caused or aggravated by the conditions or obligations under which the claimant's work was carried on, claimant should be entitled to compensation." Id. at 564.

The Board stated that "if employment factors aggravate, accelerate or combine with a preexisting disease to produce an accidental injury, the test of causation is satisfied." Id. at 565 (citations omitted). Although the employer argued that the claimant's disability from his varicose veins was the result of the natural progression of his disease and not his work, the Board held that the evidence was insufficient to overcome the opinions of the physicians who stated that the claimant's symptoms were worsened by his work. Id. at 566.

In Pittman, supra, the claimant, a

tugboat steelfitter, suffered from hemorrhoids. This condition worsened over time and eventually required surgery. He sought temporary total disability benefits when he missed work after his surgery. Id. at 213. The employer argued that the claimant had not suffered an "accidental injury" because an accidental injury occurs suddenly or unexpectedly and not over a long period of time. The Board rejected this argument stating that it was "sufficient for the purposes of causation if claimant's employment 'aggravated the symptoms of the process.'" Id. at 214.

In Foundation Constructors, supra, the claimant suffered from back problems. He had worked for the H.R. Lauritzen Co. as a pile butt driver prior to April 1, 1977; on that date, Foundation Construction took over Lauritzen's operations and the claimant continued to work for Foundation Construction. Although the claimant's physician had informed him to avoid those parts of his job that caused him back pain, the

claimant continued to work as a pile butt driver, which included duties such as operating a jackhammer, a saw, and a drill and carrying large pieces of steel, concrete, and lumber. Foundation Constructors, supra, at 622. The claimant worked until October 13, 1977, when his physician determined that his back condition had deteriorated to the point that the claimant could no longer perform his duties. Id.

The claimant filed a claim for benefits under the Act, and the employer argued that it should not be held responsible for the claimant's entire disability when the claimant had only been employed by them for the last six months of his working life. Id.. at 623. The court recited the "last employer" rule which states that the claimant's last employer is liable for all of the compensation due the claimant even though prior employers of the claimant may have contributed to his disability. Id. The court stated that the branch of the last employer rule applicable in that case was the "two-

injury rule" because the claimant's injury was not a disease but a "cumulative trauma." Id. Under that rule, if a subsequent injury aggravated, accelerated or combined with the claimant's prior injury, thus resulting in the claimant's disability, the subsequent injury is the compensable injury and the subsequent employer is liable.[4] Id. at 624. This rule applies even though the worker did not incur the greater part of his injury with that particular employer. Id. Thus, if the claimant's six months of work with Foundation Constructors aggravated the claimant's back, Foundation Constructors would be liable under the Act. Id.

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[4]I note that although the case refers to a subsequent "injury," there need not be any particular "accident" or incident that causes the ultimate disability or aggravation. In Foundation Constructors, the claimant's back condition merely worsened over time due to the work he was performing. There was no particular precipitating event that marked the beginning of his period of disability; a gradual worsening into disability is compensable under the Act.

The evidence in Foundation Constructors showed that the claimant's back condition had worsened during the time the claimant worked for Foundation Constructors. His physician testified that the strenuous work that the claimant performed for Foundation was harmful to his back condition. Two other physicians corroborated this testimony. Id. at 624.

Therefore, in this case, the claimant has suffered a compensable injury under the Act and Meehan, his last employer, is the employer responsible for payment of any benefits if the claimant can show that his working conditions at Meehan could have aggravated his knee condition. As the cases cited above show, the claimant need not establish a particular accident that caused his disability; it is enough that his condition gradually worsened to the point that he became disabled if his work aggravated, accelerated or combined with his pre-existing knee condition.

The record shows that the claimant had increasing knee pain from at least 1985

to 1989, and that on October 14, 1989, the claimant's work carrying 110-pound bags of grain could have aggravated his knee condition to the extent that the claimant was unable to return to work. The claimant testified that he did not return to work after October 14, 1989 because of his knee condition, and I see no reason for disbelieving this testimony.

The claimant testified that after initially developing his knee condition (of whatever origin), the condition became progressively worse over the years. He stated in a letter to the Department of Labor in 1985 that his knee was hurting him more and more. The claimant was examined in 1986 by both Dr. Scott and Dr. Moen for increasing knee pain, and he was prescribed medication. There is no indication in the record why the claimant saw Dr. Scott in 1986; that is, there is no indication that there was a reinjury, accident or "incident" that caused the claimant to seek medical treatment. The record shows that the

claimant was experiencing increased pain and sought relief. The claimant continued to work in heavy labor until 1989, and he testified that during that time, he had knee pain and that it increased in severity. The claimant ceased working on October 14, 1989, when he was lifting 110-pound bags of grain, although the longshore season was not complete. His pain had become severe enough that he sought treatment, although he had not been to a physician for his knee since 1986. Dr. Moen's notes from November 1, 1989, show that the claimant was having continuing problems with his right knee. He complained of a sharp pain in the medial side of his knee.

The claimant's amended claim for compensation states that the claimant had a second injury (within the meaning of the Act) on October 14, 1989, when he was carrying 110-pound bags. The claimant informed Dr. Person that he had continued to have difficulties with his knee from the first time he injured it until 1989, when he stated that he reinjured his knee

at work. He told Dr. Person only that he was carrying 110-pound bags and his symptoms seemed to get worse. Based on this history, Dr. Person stated that the claimant's knee injury was caused by the accident in 1979 and aggravated by the injury of October 14.

The claimant testified that he did not report the accident on October 14 because he always attributed everything that happened to his knee to his supposed injury in 1979. He also stated in 1986 and again in 1989 that he would have reported an injury to his knee in 1989 if one had occurred. This testimony, however, is not necessarily inconsistent with the evidence that the claimant's knee condition was aggravated in 1989. The record demonstrates that the claimant apparently believed that his right knee condition was caused by his accident in 1979. He stated, and the record shows, that he had increasing pain in knee over the years. It is understandable that if in 1989 the claimant simply had more severe pain of the same type of pain he

had had over the years, he would attribute his pain to the old injury. The claimant could not be expected to know that Meehan might be responsible under the Act for an aggravation or exacerbation of an old injury.

The claimant's counsel's statements in his 1990 letter to Mr. Stamper are not entirely inconsistent with the evidence that the claimant's knee condition was aggravated in 1989. Putting aside the wisdom of Mr. Stamper's statement that the claimant had to choose which insurance carrier to pursue and counsel's equivocations about what happened on October 14, I note that counsel's letter stated that the claimant was lifting and carrying 110-pound bags and that he did experience pain at that time. Counsel further stated that the claimant, after having time to think it over, stated that the "work he did" at Meehan (not the accident he had)[5] temporarily aggravated

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[5]Determination of the permanency of the aggravation was, however, was beyond the claimant's area of expertise.

his knee condition.

The fact that there is no evidence that shows that the claimant's work at Meehan caused his knee condition initially or that the work the claimant performed at Meehan was the sole cause of the aggravation or exacerbation of the knee condition does not relieve Meehan of responsibility, for the ultimate injury. See e.g., Foundation Construction, supra; Gardner, supra.

Based on all of the evidence, I found that the claimant has established that his work at Meehan on October 14, 1989, could have aggravated his knee condition. The claimant's testimony showed that he suffered increased and severe pain on that day while working and that he did not thereafter return to work. Dr. Person, informed by the claimant that the claimant had increased symptoms while lifting 110-pound bags, found that the claimant aggravated his condition on October 14, 1989. The claimant has established a prima facie case.

The burden is now on the employer, Meehan, to show substantial evidence that severs the causal connection between the claimant's injury and his employment.

The inconsistencies in the claimant's testimony, while detracting from his credibility, do not prevent a finding that the evidence of record establishes that the claimant's work on October 14, 1989, aggravated his knee condition. No physician stated an opinion that the work did not aggravate the claimant's condition, and, as stated above, Dr. Person stated an opinion that the work on October 14, 1989 did aggravate the claimant's condition. Dr. Moen did not specifically state what he thought the cause of the claimant' s meniscal tear was. He stated in a letter that the claimant had an injury and that the claimant stated that "this originally occurred when he slipped on a boat in 1979." Dr. Moen did not address whether the claimant's heavy labor on October 14, 1989, or at any other time aggravated his knee condition. Dr. Engasser stated an

opinion that the alleged 1979 injury to the right knee, even if it occurred, was not a substantially contributing cause of the claimant's knee problems in 1989. Dr. Engasser had been told that the claimant twisted his knee on October 14, 1989, and he apparently did not consider whether without that incident the claimant's work on that day would have aggravated a pre-existing condition.

There is no other contrary evidence of record that would overcome the presumption of a causal connection between the claimant's knee condition and his employment. I therefore find that the claimant has suffered a compensable injury, under the Act and that Meehan is the employer responsible for the payment of any benefits.

B. Timeliness of notice of injury.

The claimant sustained an injury within the meaning of the Act on October 14, 1989. The claimant informed Mr. Petrovich of his injury; Mr. Petrovich

was the claimant's "walking boss" that day. He filed a claim for compensation on May 9, 1990. The employer argues that notice was insufficient under the Act and that the claimant's claim is therefore time barred.

As relevant here, §12(a) of the Act states that notice of an injury must be given to the deputy commissioner and the employer within 30 days after the injury or within 30 days after the employee was aware or in the exercise of reasonable diligence should have been aware of a relationship between his injury and his employment. The notice must be written and must

contain the claimant's name and address and a statement of the injury §12(b). Failure to give such notice bars the claimant's claim for compensation unless the claimant can establish one of several exceptions. See §12(d).

Section 702.216 of 20 C.F.R. states that the failure to give timely notice to the employer shall not bar any claim for

compensation if "(a) The employer, carrier or designated official had actual knowledge of the injury or death; or (b) the district director or ALJ [administrative law judge] determines that the employer or carrier has not been prejudiced[;] or (c) the district director excuses failure to file notice." Actual knowledge exists if the employee's immediate supervisor was aware of the injury. §702.216.

I do not think that the employer can be imputed with actual knowledge of the claimant's injury. The claimant stated that he informed Mr. Petrovich of his injury; Mr. Petrovich testified that the claimant told him that he had twisted his knee after stepping into a crevice or hole between the bags on the floor. However, I have found that the claimant did not sustain such an injury and thus the claimant's and Mr. Petrovich's testimony on this matter has reduced credibility. Moreover, even if the claimant had informed Mr. Petrovich that his knee was hurting at the end of the

day, the claimant informed Mr. Petrovich that the injury was not from his work that day but from a prior injury in 1979. Thus, the employer could not have known through Mr. Petrovich or otherwise that day that the claimant had sustained an injury at work.

In Osmundsen v. Todd Pacific Shipyards, 18 BRBS 112, 115 (1986), the Board held that the time limit in §12 did not begin to run until the claimant knew the employer was potentially liable under the "last employer" rule. The claimant had worked for the second employer only a short time and the Board stated that he "logically thought" that the first employer was properly liable. Id. In this case, I have found that the claimant may have thought that American was the employer responsible for his injury. The claimant's claim is timely filed according to the rule in Osmundsen if he filed his claim within 30 days after he knew or should have known of Meehan's potential liability.

The claimant testified that he did not recall when he first believed that Meehan was partly responsible for his injury (A 17 at 78). Thus, it is impossible to tell whether the claimant filed his claim (and thus provided notice of the injury) within 30 days after he knew that, Meehan was potentially liable.

However, based on all of the evidence, I find that there has been no showing of prejudice to Meehan in this case. The testimony and evidence show that the claimant, who was unaware of the "aggravation" rule under the Act didn't know at the time of his injury in October 1989 that Meehan, was potentially liable for his knee condition. At that time he attributed his knee pain to another employer. He filed a claim for benefits in February 1990 that named only American; thus he did not know as of that date, four months after he stopped working, that Meehan was potentially liable. He filed his amended claim in May, 1990. Based on these facts, I find that Meehan was not prejudiced by the

delay in notification of the claimant's injury.

The claimant's claim for benefits was timely filed.

C. Nature and extent of disability.

1. Temporary v. permanent injury

The claimant requested temporary total disability benefits from October 15, 1989 to April 17, 1989 and permanent total from April 18, 1990 and continuing (Tr. at 47-48). He also requested permanent partial disability on the ground that the knee injury was a scheduled injury.

The date on which, the claimant reaches maximum medical improvement is the date of permanent disability. Luce v. Bath Iron Works 12 BRBS 162, 165 (1979); Palumbo v. Director OWCP 937 F.2d 70, 76(2nd Cir. 1991). An employee is permanently disabled "when his condition has continued for a lengthy period and it appears to be of lasting or indefinite

duration, as distinguished from one in which recovery merely awaits a normal healing period." Watson v. Gulf Stevedore Corp. 400 F.2d 649, 654 pet for reh. den. sub nom, Young & Co. v. Shea ,404 F.2d 1059 (5th Cir. 1968) (per curiam) cert. den. 394 U.S. 976 (1969); see also Crum v. General Adjustment Bureau 738 F.2d 474 (D.C. Cir. 1984); Phillips v. Marine Concrete Structures, Inc., 21 BRBS 233, 235 (1988); Care v. Washington Metropolitan Area Transit Authority, 21 BRBS 233, 251 (1988). A claimant need not be pronounced medically incurable before he can be considered permanently disabled; the fact that the claimant may improve at some future date does not preclude a finding of permanent disability. Watson, supra, at 654; Mills v. Marine Repair Service, BRBS 115, 117 (1988).

The claimant, as stated above, alleged that his disability was temporary until April 17, 1990. Neither American nor Meehan disputed this date. The medical evidence shows that as early as March 5,

1990, Dr. Moen indicated that the claimant had a permanent partial whole body disability of 2 to 5 percent (A 13 at 7). On March 26, 1990 Dr. Moen examined the claimant and stated that at that time he believed that the claimant would not be able to return to his longshore employment (A 13 at 7). In a letter dated April 18, 1990 Dr. Moen summarized his treatment of the claimant and stated that the claimant had a 5 percent permanent partial disability (M 12). Dr. Person did not state what he believed to be the duration of the claimant's total disability. On April 22, 1991, Dr. Moen stated that the claimant's restrictions were permanent and that his knee condition would not change (C B1 at 22). Dr. Engasser stated an opinion that the claimant was temporarily totally disabled from, October 14, 1980 until six weeks after his surgery (A 19), which would have been sometime around March 21, 1990.

Based on this evidence, I find that the claimant was temporarily disabled until

April 18, 1990 on which date his disability became permanent. Dr. Moen's letter of April 18, 1990 indicates that the claimant is permanently disabled and sets a definite disability rating of 5 percent. The claimant had reached maximum improvement on that date. On March 5, 1990, Dr. Moen did indicate that the claimant's disability would be permanent but he was not clear as to the whether the claimant had reached maximum healing as demonstrated by his statement that the claimant's whole body, disability would be between 2 and 5 percent. By April 18, 1990 it was clear to Dr. Moen that the claimant would not improve beyond the 5 percent disability.

2. Total v. partial disability

The parties dispute whether the claimant is totally or only partially disabled. Under the Act the concept of disability, is an economic one based upon a medical foundation. Luce v. Bath Iron Works Corp. 12 BRBS 162, 165 (1979). Total disability is the complete incapacity to

earn pre-injury wages in the same work as at the time of the injury, or in any other employment. In order to establish a prima facie case of total disability the claimant must establish that he cannot return to his regular or usual employment due to his work-related injury. If this burden is met the employer must then establish the existence of realistically available job opportunities within the geographical area in which the claimant resides that he is capable of performing, considering factors such as his age, education, work experience and physical restrictions. American Stevedores, Inc. v. Salzano, 538 F.2d 933 (2d Cir. 1976); Stevens v. Director, OWCP, 909 F.2d 1256,1258 (9th Cir. 1990); Director, OWCP v. Berkstresser, 921 F.2d 306, 311-12 (D.C. Cir. 1991); Palumbo v. Director, OWCP, 937 F.2d 70, 73 (2nd Cir. 1991); Rinaldi v. General Dynamics Corp. 25 BRBS 128, 131 (1991). If the employer meets its burden, the claimant's disability is considered partial unless the employee can show that he diligently tried and was

unable to secure positions within the compass of the job opportunities identified by the employer. See Palumbo, supra, at 73; Roger's Terminal & Shipping Corp. v. Director, OWCP, 784 F.2d 687, 691 (5th Cir. 1986).

In this case, the evidence shows that the claimant is unable to return to his usual longshore work. Dr. Moen stated in a letter dated July 23, 1991, that the claimant could not return to his usual longshore work because of the degenerative condition in his knee (C B1 at 23). Dr. Person also stated that the claimant could not return to longshore work (A 14). Dr. Engasser stated that the claimant would be able to perform medium work and that he could lift and carry no more than 34 pounds. Dr. Person stated that the claimant would have a lifting restriction of no more than 40 pounds using both legs or more than 10 pounds using his right leg. These lifting restrictions alone would prevent the claimant's return to longshore work because his previous job required lifting

and carrying 110-pound bags of grain.

The claimant has established a prima facie case that he is totally disabled. The burden now shifts to the employer to demonstrate the availability of suitable alternate employment.

Jack H. Casper, a vocational rehabilitation consultant testified at the hearing. Mr. Casper had been a vocational rehabilitation consultant for approximately eight years, and he was employed by Crawford Health and Rehabilitation in Duluth, Minnesota (Tr. at 123). Mr. Casper reviewed the medical evidence of Drs. Budd, Moen, Engasser and Person, and he interviewed the claimant (Tr. at 126). He interviewed the claimant for two and one-half hours on July 19, 1991 (Tr. at 136), performed a transferrable skills analysis and gave the claimant a wide range achievement test which indicates grade levels in reading, spelling and math (Tr. at 137). He did not, however, review the want ads in the local newspapers or contact

Wisconsin or Minnesota job services agencies to determine whether jobs existed that were within the claimant's restrictions (Tr. at 141).

Mr. Casper stated an opinion that there was no work in the local economy or extended local economy that the claimant was capable of performing (Tr. at 133). This opinion was based on the claimant's age, his history of performing unskilled arduous labor, and his lack of transferrable skills (Tr. at 133). Mr. Casper stated that the claimant would be limited to sedentary work, even taking Dr. Engasser's opinion into account because Dr. Engasser stated that the claimant could be on his feet for no more than four hours per day (Tr. at 134). Mr. Casper stated that adaptation to different "tools, processes and work settings" was difficult for persons aged 50 to 55 (Tr. at 134). He stated that due to the claimant's limitation to unskilled, sedentary work, he would be limited to between 1 and 3 percent of the all jobs. Of those jobs, 85 percent were

"bench work" occupations which could not be found in that area, and 15 percent were "menial office types of occupations" which also were unavailable at that time, "especially for a man 52 years old with no previous history, no transferrable skills" (Tr. at 135). Taking into account the claimant's subjective complaints, such as having eight to ten "bad days" per month when he cannot concentrate and having to elevate his leg on a daily basis, Mr. Casper stated that the claimant was "unemployable" (Tr. at 135).

Mr. Casper did state that the claimant possessed the requisite "work processes" (Tr. at 144) to perform jobs such as flipping hamburgers or operating a french fry machine at a fast food restaurant on a short tern basis (Tr. at 143-45), but he indicated that he did not believe that the claimant could perform those jobs because of an inability to adapt to the new work setting and processes (Tr. at 145-47').

At the hearing Mr. Casper related the following exchange that he had with the claimant:

> I said, "Mr. Hizinski, what about [a] job? Let's put you in an assembly position, or a desk position. And, we will put you in that [job] part time or full time right now. Could you do the job if you needed?"
>
> I think his response was something to the effect of, "After 35 years of work outside, I couldn't stand it. I couldn't do it."

(Tr. at 148). Upon questioning he stated that the claimant's inability to work inside was not due to his knee injury, but "it is something that all of us bring to any work situation at that age" (Tr. at 149). However, there was no medical reason that the claimant could not work four hours per day on his feet and four off (Tr. at 150). Interpreting the medical restrictions "most liberally,"

Mr. Casper stated that the claimant would be physically able to perform sedentary work, but that it would have to be unskilled work (Tr. at 152). Mr. Casper did not perform a functional capacities test (Tr. at 153-54). He stated an opinion that the claimant had no transferrable skills (Tr. at 157).

Paul Genereux, a certified rehabilitation specialist, prepared a labor market survey in regard to the claimant's employment situation (M 15 at 6, 12). The labor market survey consisted of contacting existing employers in the claimant's labor market area to determine the availability of specific jobs (M 15 at 13). Mr. Genereux reviewed reports from Dr. Moen, Dr. Scott, St. Mary's and St. Luke's Hospital, and the MRI scan report (M 15 at 14). The most recent letter he reviewed was written by Dr. Moen on April 1, 1991. Mr. Genereux stated that he had "limited information" on the claimant's work history, but understood that the claimant had worked for approximately 30 years as a

longshoreman (M 15 at 15). Based on this work history, Mr. Genereux stated that the claimant would have no significant transferrable skills so that Mr. Genereux examined the types of sedentary and light duty employment that the claimant could do in Duluth (M 15 at 15-16).[6]

Mr. Genereux identified five occupational areas in which the claimant might be able to get a job: security guard, surveillance system monitor, parking lot attendant, retail clerk, and telephone messenger (M 15 at 18). Of the employers in that area that he contacted, 12 responded to the survey and 10 to 15 did not respond (M 15 at 18). Although he identified the five areas mentioned above, Mr. Genereux stated later in his deposition that based on his labor market survey and his understanding of the claimant's background, he did not think that the claimant would have a reasonable chance of obtaining positions in the

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[6]Mr. Genereux stated that he used the Dictionary of Occupational Titles to define "light" and "sedentary" work (M 15 at 16).

areas of surveillance monitor or telephone messenger (M 15 at 33). Therefore, only the testimony regarding the other three areas will be reviewed in detail.

The security guard position identified by Mr. Genereux as suitable for the claimant involved monitoring businesses and premises. This job required walking through the plant and checking locks possibly once every hour or two hours (M 15 at 19). He contacted three employers in the Duluth area: Midwest Patrol, which had hired two days prior to the day of Mr. Genereux's contact; Pinkerton, which had hired 10 days prior to Mr. Genereux's contact; and Twin City Security, which had hired two to three weeks prior to Mr. Genereux's contact. All three employers stated that they did not know when they would again be hiring, but they stated that "it was not difficult to find good people" (M 15 at 23). The physical requirements of these positions included alternating between sitting and walking on a frequent basis (M 15 at 24). The

claimant would have to complete rounds through the plant three to four times an hour depending on the size of the plant (M 15 at 24). Midwest Patrol stated that they preferred someone with law enforcement or service experience (M 15 at 63). The majority of these positions paid between $4.25 and $5.50 an hour (M 15 at 24). Mr. Genereux stated that in his experience both full-time and part-time positions were available in this area (M 15 at 25).

The parking lot attendant position involved collecting parking fees from customers in a parking ramp and using a cash register (M 15 at 20). Mr. Genereux testified that he contacted two employers in Duluth: the Medical Arts Building and St. Mary's Ramp (M 15 at 27). Both indicated that they had a high turnover in employees and both had hired within the weeks prior to contact by Mr. Genereux (M 15 at 27). There was no special training involved in these positions and the physical requirements included primarily sitting with some

minimal standing and walking M 15 at 28). When there were no cars coming down the ramp the claimant would be able to stand and stretch as needed (M 15 at 28). The salary for these jobs was $4.25 per hour with highest pay at $5.00 per hour.

The video store clerk position involved checking out videos from individuals and also required some light stocking or placing videos back on the shelves (M 15 at 20). Mr. Genereux stated that he spoke with two employers in this area: Eighth Street Video and Mr. Movies. Mr. Movies had hired in the weeks prior to contact by Mr. Genereux and Eighth Street Video had hired in the past six months (M 15 at 28). The position at Mr. Movies required some ability to operate a computerized register (M 15 at 29). Physical requirements were in the light to sedentary range and required lifting no more than 20 pounds (M 15 at 29). The positions paid between $4.25 per hour and $5.00 per hour.

Mr. Genereux stated an opinion that

"given a reasonable job search, given assistance in job search from a professional," the claimant would be able to obtain any of the positions listed above (M 15 at 33). He stated that the claimant would be able to obtain the jobs he listed without significant impairment by his 30-year history of performing exclusively longshore activities. because the jobs he identified were entry level positions that did not require specific skills (M 15 at 33-34). Mr. Genereux did not believe that the claimant would be vocationally limited by his 30 year history of longshore work (M 15 at 35). He stated that the claimant would have developed a skill for performing relative cyclical activities (M 15 at 36). He stated that without a vocational assessment it would be difficult to state whether the claimants leaving longshoring and going into any of the positions described by Mr. Genereux would be such a change in process or such a change in tools that [the claimant] would not be able to perform one of the jobs" (M 15 at 36-37). However, based on the

information he had, such as the claimant's obtaining a GED and the claimant's communication skills as indicated by his testimony at the hearing. Mr. Genereux stated an opinion that the claimant would be able to obtain the positions he described (M 15 at 37-38).

Mr. Genereux's labor market survey was conducted on October 31, 1991; he did not conduct a further labor market survey to determine whether positions were currently available in the positions he described at the time of his deposition (M 15 at 60-61). He stated that the descriptions of the positions that he provided were general descriptions and not specific job positions that were unavailable (M 15 at 61). He never determined the exact physical requirements of the actual jobs that the employers had stated were available (M 15 at 62). Mr. Genereux never asked any of the potential employers if they would hire a 52-year-old man with the physical limitations that the claimant had (M 15

at 64-67). At the time he performed his labor market survey, Mr. Genereux was not aware that the claimant walked with a cane (M 15 at 70). He stated that the claimant did have some transferrable skills according to the Dictionary of Occupational Titles, such as "comparing, speaking, signaling, and handling" (M 15 at 75). He stated that his opinion of the claimant's ability to obtain a position could have been affected if he had known of Dr. Moen's July 23, 1991, letter.

Mr. Casper reviewed Mr. Genereux's deposition testimony. In a letter dated November 15, 1991 (C 9), Mr. Casper stated that Mr. Genereux had "failed to find even one specific job opening reasonably obtainable for [the claimant] considering his age, education, work history and disability." He stated that the security guard position is listed as "light" employment in the Dictionary of Occupational Titles, which requires the ability to be on one's feet for 6 hours out of an 8 hour day. Mr. Casper stated

that he called Twin City Security and the person there stated that Twin City would not hire someone with a knee injury who had limitations on the time he could spend on his feet; the job at Twin City required a lot of walking. Mr. Casper stated that parking lot attendant jobs are also considered "light" duty work. He stated that he worked in the Medical Arts Building and that the attendants parked cars and had to go get cars, requiring a lot of time on their feet. The video store clerk position was also light duty. Mr. Casper stated that there had been no showing that any of the jobs were realistically available for the claimant. Mr. Casper wrote another letter on March 17, 1997, in which he reiterated his statements in his November letter. He also stated that because of the claimant's previous work and his present injury he is totally disabled.

The burden of proof of total disability was set out above: the claimant must demonstrate the inability to return to his longshore work. If he does so, he is

presumed to be totally disabled. The burden then shifts to the employer to show the availability of jobs that the claimant could realistically obtain, considering his age, education, work experience, and physical limitations. If the employer shows the availability of suitable alternative employment, the claimant is considered partially disabled. The burden then shifts back to the claimant to show that he diligently tried and was unable to obtain a position within the compass of jobs identified by the employer.

The Fifth Circuit set out the following analytical framework for determining whether the employer has met its burden of establishing suitable alternative employment:

> Job availability should incorporate the answer to two questions. (1) Considering claimant's age, background, etc., what can the claimant physically and mentally do following his injury,

that is, what types of jobs is he capable of performing or capable of being trained for? (2) Within this category of jobs that the claimant is reasonably capable of performing, are there jobs reasonably available in the community, for which the claimant is able to compete and which he could realistically and likely secure? This second question in effect requires a determination of whether there exists a reasonable likelihood, given the claimant's age, education, and vocational background that he would be hired if he diligently sought the job.

New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 1042 (5th Cir. 1981); P&M Crane Co. v. Hayes, 930 F.2d 424, 430 (5th Cir. 1991). In order to establish the existence of particular suitable alternative employment, the employer must show that the job identified is compatible with the claimant's physical and mental

capabilities. See Davenport 16 BRBS 196, 199-200 (1984). For job opportunities to be realistic, the employer must establish their precise nature and terms. Rieche v. Tracor Marine, Inc., 16 BRBS 272, 274 (1984); Davenport v. Daytona Matine & Boat Works, 16 BRBS 196, 200 (1984).

On March 5, 1990, Dr. Moen stated that the claimant had the following limitations: the claimant should avoid stairs and ladders and would be unable to work on scaffolding above six feet high. He would benefit from a job that did not require standing, pushing, or pulling heavy loads. At that time, Dr. Moen believed that the claimant would eventually be able to return to full weight bearing on his knee but could do no squatting, deep knee bends, or kneeling (A 13 at 7).

After examining the claimant on March 26, 1991, Dr. Person stated an opinion that the claimant would be unable to return to his usual longshore work. He stated that the claimant would not be able to walk

extensively (no more than once per hour and no more than 20 feet) up and down gangways or inclined surfaces or ladders. Dr. Person stated that while claimant could not do repetitive crouching or lifting using his right leg and should not do any type of work that involved repetitive flexing or extension of the right knee (A 14).

Dr. Engasser examined the claimant on May 30, 1991 (A 19). During this examination, the claimant told Dr. Engasser that he was able to mow his grass and do dishes. The claimant stated that he hard problems with his knee when he would kneel, squat, crouch, stand or walk more than one mile, but he could go fishing and had no problems sitting. Dr Engasser noted that the claimant had pain in his knee but he noted no swelling and stated that there was no evidence of ligamentous instability. Dr. Engasser stated an opinion that the claimant would have no limitation with regard to sitting and could stand and walk four hours each in an eight hour day. He would have a

34-pound weight lifting and carrying restriction, with no kneeling, crawling, or ladder climbing and only occasional stair climbing. Mr. Genereux was not provided with a copy of Dr, Engasser's report.

In a letter dated July 23, 1991, Dr. Moen stated that the claimant had persistent pain and swelling in his knee whenever he did any type of moderate walking, climbing, kneeling or bending (C 1B at 23). Mr. Genereux was not provided with a copy of this letter.

Mr. Genereux himself stated that the claimant would probably be unable to obtain the positions of surveillance monitor and telephone messenger. Mr. Genereux believed that the other positions he identified, security guard, video store clerk and parking lot attendant were suitable for the claimant.

Based on the physicians' reports, I find that the security guard position identified by Mr. Genereux would not be

suitable for the claimant because it has not been established that this position is within his physical restrictions. Dr. Moen, Dr. Person and Dr. Engasser all stated that the claimant would have difficulties with extensive walking. As described by Mr. Genereux, the security guard position he found required alternating between sitting and walking on a frequent basis. The number of times and the frequency of times that the claimant would have to walk around the plant, and thus the suitability of the job would depend on the size of the plant and the schedule of monitoring. It is not at all clear that even one of the security guard positions would be within the claimant's physical limitations.

Mr. Genereux's report and his testimony do not establish that the position of video store clerk is within the claimant's physical limitations. There is no indication of the amount of time that the claimant would spend standing at this position; moreover, Mr. Genereux indicated that "light stocking" might be

required. The claimant is limited in the amount he can lift and carry and is restricted in his ability to stand, squat, bend his knee and kneel. Thus there has been no showing that the video store clerk positions would be within the claimant's physical limitations.

Mr. Genereux also identified the position of parking lot attendant as suitable for the claimant. Mr. Genereux testified that he had contacted two employers in this area and that those employers informed him that they had positions that required primarily sitting with some minimal standing and walking. However, Mr. Casper testified that the position at the Medical Arts Building required considerable walking because the attendants at that lot apparently had to retrieve cars from the lot as part of their jobs. Based on this conflicting testimony of the duties required of the parking lot attendant position identified by Mr. Genereux, I find that the position at the Medical Arts Building has not been shown to be within the claimant's

physical limitations. Considering the discrepancy in the job duties required in the position I find that the evidence does not establish that the parking lot attendant position is within the claimant's physical limitations. While the claimant may be able to perform a parking lot attendant position that required only sitting in a booth collecting fees, the positions identified by Mr. Genereux have not been shown to be those types of positions; contrary to Mr. Genereux's testimony, there is some evidence that the position at the Medical Arts Building requires walking that may be beyond the claimant's physical abilities. Since Mr. Genereux may have been mistaken as to the physical requirements of the parking lot attendant position at the Medica Arts Building he may also be mistaken about the position at St. Mary's. As stated above, for a position to be suitable, it must be shown that the precise nature and duties of the position are within the claimant's limitations. There has been no such showing here.

Because the employer has failed to establish the existence of suitable alternate employment, the claimant has established by way of presumption that he is totally disabled.

D. Average weekly wage.

Section 10 of the Act states that if the injured employee worked in the employment in which he was working at the time he was injured for substantially the whole of the year immediately preceding his injury, his average annual earnings shall be three hundred times his average daily wage for a six day worker and two hundred and fifty times his salary for a five day worker. §10(a). The phrase "substantially all of the year" refers not to the number of days that the claimant worked but rather to whether the claimant's work was steady.

The claimant's tax return shows that he earned $5287.05 in 1989 in longshore work (C 3). There was no other testimony or evidence to establish the claimant's

wages in 1989 and no argument or showing that these wages did not reflect the claimant's earning capacity in 1989. The claimant's work record shows that he worked 43 days in 1989 (A 11), giving him an average wage of $122.95 for each day he actually worked. The claimant's record does not reflect that he was either a five day worker or a six day worker. The record shows that he worked between two and five days at a time. He worked five consecutive days only once. Assuming his daily wages were about the same for the days he worked in the five prior years he would have earned approximately $10,800 in 1988 $4 800, in 1987 $15,900 in 1986 $7,000 in 1985 and $14,300 in 1984.[7]

Section 10(c) provides that if either §10(a) or §10(b) cannot be fairly and reasonable applied, - the claimant s average annual earnings shall he "such

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[7]According to Deposition Exhibit 2 which is a part of A 17, the claimant worked 116 days in 1984, 57 days in 1985, 129 days in 1986, 39 days in 1987 and 88 days in 1988.

sum as, having regard to the previous earnings of the injured employee in the employment in which he was working at the time of the injury, . . . shall reasonably represent the annual earning capacity of the injured employee." In this case, neither §10(a) nor §10(b) be fairly and reasonably applied. There is no indication that the claimant was either a five day or a six day worker. Section 10(a) cannot be applied because the claimant worked only 68 class in the 12 months before his October 14, 1989 injury. Section 10(b) cannot be applied because there is no evidence in the record of what an employee of the same class working substantially the whole of the immediately preceding year would have earned. Therefore the claimant's average weekly wage must be computed under §10(c).

If the claimant's estimated earnings from the years 1984-1988 and his actual earnings in 1989 were averaged, the claimant would have average annual earnings of about $9,675.00 for the six

calendar years 1984-1989.[8] Based on this record I find that the claimant's average annual earnings were $9,675.00. Dividing this figure by 52 according to §10(d)(1), the claimant's average weekly wage was $186.00 in 1989.

E. Compensation.

Compensation for permanent total disability is 66-2/3 percent of the claimant's average weekly wage payable

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[8]Use of this method may have a tendency to underestimate the claimant's six-year average wages because it includes the portion of 1989 after October 14 when the claimant was disabled due to his injury. Thus, a partial year is treated as a whole year in the calculation. However, this flaw in the method of calculation makes no practical difference in the result. As of October 14, 1989 the shipping season in Duluth-Superior was drawing to a close. Inclusion in the calculation of any wages the claimant might have earned during the period October 14, 1989 to December 31, 1989 could not have affected the computation of two-thirds of his average weekly wage enough to have raised it above the minimum compensation rate of $165.16.

during the duration of the claimant's permanent total disability. §8(a). Sixty-six and two-thirds percent of the claimant's average weekly wage is $124.00.

Section 6(b)(2) of the Act states that compensation for total disability may not be less than 50% of the applicable national average weekly wage.[9] At the time of the claimant's injury the national average weekly wage was $330.31, and the minimum compensation rate based on that amount was $165.16 (see Longshore Newsletter and Procedure Manual Appendix at 303 (Supp. 1991)). The claimant is therefore entitled to a compensation rate of $165.16. The claimant is also entitled to cost of living adjustments in

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[9]That section states that if the claimant's average weekly wage is less than 50% of the national average weekly wage, the claimant's average weekly wage shall be his compensation rate. In this case, the claimant's average weekly wage was $186.00, which is over 50% of the national average weekly wage. See Longshore Newsletter and Procedure Manual Appendix at 303 (1991).

his compensation rate according to §10(f). The claimant is entitled to an adjustment of 3.26% increase in compensation due between October 1, 1990, and September 30, 1991; and a 2.61% increase in compensation due between October 1, 1991, and September 30, 1992; and to appropriate increases after that date. See Longshore Newsletter and Procedure Manual Appendix at 304 (Supp. 1991).

Because the claimant is awarded permanent total disability benefits, he is not entitled to a §8(c) schedule award. See Davenport, supra at 199.

Payment of medical expenses. The record contains evidence of medical expenses incurred by the claimant in connection with his knee condition. Dr. Person stated an opinion that the claimant's medical treatment for his knee had been reasonable and necessary. Based on the finding that the claimant's knee condition arose out of and in the course of his employment with Meehan and Dr.

Person's statement, I find that the itemized medical expenses (C 2) were reasonable and necessary for the claimant's treatment and were therefore compensable. See §7 of the Act.

Liability of American. The record does not disclose any basis for imposition of further liability for compensation in this case on American Grain Trimmers, Inc.

ORDER

Based on the foregoing findings of fact and conclusions of law and upon the entire record, I issue the following compensation order.

IT IS ORDERED THAT:

1. Meehan Seaway Service shall pay to the claimant, Robert Hizinski, the following compensation:

(a) for temporary total disability benefits for the

period October 15, 1989, to April 17, 1990, the sum of $4,341.34 (26-2/7 weeks at the rate of $165.16);

(b) for permanent total disability benefits for the period April 18, 1990, to September 30,1990, the sum, of $3,893.06 (23-4/7 weeks at the rate of $165.16); for the period October 1, 1990, to September 30, 1991, the sum of $8,868.08 (52 weeks at the rate of $170.54);

(c) permanent total disability benefits for the period October 1, 1991, to date and continuing, at the rate of $174.99, as augmented by §10(f);

2. Meehan Seaway Service shall pay for or furnish such reasonable, appropriate and necessary medical care and treatment that the claimant's work-related knee

injury shall require, subject to §7 of the Act, as well as the claimant's past medical expenses as itemized in C 2.

3. The claimant's attorney shall file, within 30 days of receipt of this decision and order, a fully supported and fully itemized fee petition, sending a copy to Meehan Seaway Service's counsel, who shall then have 14 days to comment on it.

/s/ Charles W. Campbell
Charles W. Campbell
Administrative Law Judge

Dated: July 31, 1992
Cincinnati, Ohio 45202

ROBERT HIZINSKI	)	BRB Nos.92-2285
Claimant-Respondent	)	and 92-2285A
v.	)	
MEEHAN SEAWAY SERVICES	)	
and	)	DATE ISSUED:
RANDLES & HOLBROOK	)	SEP 12, 1996
Employer/Carrier	)	
Petitioners	)	
Cross-Respondents	)	
and	)	
AMERICA GRAIN TRIMMERS,	)	
INCORPORATED	)	
Employer-Respondent	)	
Cross-Petitioner	)	
ROBERT HIZINSKI	)	BRB Nos. 93-780
Claimant-Petitioner	)	and 93-780A
Cross-Respondent	)	
v.	)	
MEEHAN SEAWAY SERVICES	)	
and	)	
RANDLES & HOLBROOK	)	
Employer/Carrier	)	DECISION
Respondents	)	AND
Cross-Petitioners	)	ORDER

Appeals of the Decision and

Order-Awarding benefits of Charles W. Campbell, Administrative Law Judge, and the Compensation Order Award of Attorney's Fee of Thomas S. Hunter, District Director, United States department of Labor.

James Courtney, III, Duluth, Minnesota, for claimant.

Gregory P. Sujack (Garofalo, Hanson, Schreiber & Vandlik, Chartered), Chicago, Illinois, for Meehan Seaway Services.

John A. Mundell, Jr. (Foster, Meadows & Ballad, P.C.), Detroit, Michigan, for American Grain Trimmers, Incorporated.

Before: SMITH, BROWN and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier Meehan Seaway Services and Randles and Holbrook: (Meehan) appeal and American Grain Trimmers, Incorporated (American Grain),

cross appeals, the Decision and Order-Awarding benefits (90-LHC-3254) of Administrative Law Judge Charles W. Campbell rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 et seq. (the Act). BRB Nos. 92-2285/A. Additionally, claimant appeals and Meehan cross-appeals the Compensation Order Award of Attorney's Fee (No. 10-12916) of District Director Thomas C Hunter. BRB Nos. 93-780/A We must affirm the findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C §921(b)(3). The amount of an attorney's fee award is discretionary and will not be set aside unless shown by the challenging party to be arbitrary, capricious, an abuse of discretion, or not in accordance with law. See, e.g.., *Muscella v. Sun Shiphuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant sustained a knee injury on December 7, 1979, while working for American Grain. Claimant received some compensation benefits from American Grain for a left knee injury and returned to work after 3 ½ weeks. Claimant thereafter began experiencing problems with his right knee, which he initially attributed to the 1979 injury claimant continued to work as a longshoreman until October 14, 1989, when he alleged that he injured his right knee while working for Meehan when he stepped into a crevice or gap between bags in the hold while carrying 110-pound bags of grain. Claimant has not worked since that date.

An MRI performed in November 1989 revealed a torn medial meniscus, and on February 2, 1990, Dr. Moen performed an arthroscopy and medical menisecctomy on claimant's right knee. On February 71, 1990, claimant wrote a letter to the United States Department of Labor, asserting a claim against American Grain, whose carrier, Midland Insurance Company, had been placed in liquidation, based on

an alleged 1979 right knee injury. Claimant filed an amended claim on May 9, 1990, adding a claim against Meehan, alleging that on October 14, 1989, he injured his right knee, "while doing heavy hold work carrying wheat bags weighing approximately 110 lbs and carrying them 5-20 ft at a time...." In a pre-hearing statement dated September 4, 1990, claimant stated he reinjured his knee on October 14, 1989, while doing heavy hold work for Meehan.

In his Decision and Order, the Administrative law judge found that in 1979 claimant injured his left knee and that therefore American Grain was not liable for the present claim for injury to his right knee. He further found that claimant was entitled to the Section. 20(a), 33 U.S.C §920(a), presumption with regard to the causal nexus between his right knee problems and his employment with Meehan and that rebuttal has not been established with regard to this condition. The administrative law judge also determined that the claimant was

timely filed under Section 12, 33 U.S.C §912, and that claimant's failure to file timely formal notice under Section 12(a), was excused pursuant to Section 12(d)(2), 33 U.S.C. §912(a), (d)(2)(1988). The administrative law judge concluded that claimant was permanently totally disabled, as Meehan did not establish the existence of suitable alternate employment, and awarded benefits based on an average weekly wage of $186.

On appeal Meehan challenges the administrative law judge's finding that claimant sustained a compensable work-related injury while in its employ on October 14, 1989. Meehan argues that the administrative law judge erroneously applied the Section 20(a) presumption based on a theory not specifically alleged by claimant, and, in addition, erred in finding that it was not prejudiced by claimant's failure to provide timely notice, calculating claimant's average weekly wage, and in concluding that claimant was permanently totally disabled. Claimant responds,

urging affirmance. Meehan has also filed a reply brief, an addendum to the reply brief, and a Motion to Cite Supplemental Authority, and claimant responds to Meehan's motion. American Grain has filed a protective cross appeal, BRB No. 92-2285A, in which it argues that inasmuch as the administrative law judge's finding that claimant's 1979 injury was to his left knee is not challenged by Meehan on appeal and the present claim is for an injury of the right knee, the administrative law judge's decision holding Meehan liable as responsible employer should be affirmed.

SECTION 20(a)

Meehan initially argues that inasmuch as the United States Supreme Court held *U.S. Industries/Federal Sheet Metal,, Inc v. Director*, OWCP, 455 U.S. 608, 14 BRBS 631 (1982), that the Section 20(a) presumption only attaches to claims which are actually made and claimant did not allege, nor would the evidence support, a cumulative trauma, repetitive trauma

repetitive aggravation, or other aggravation theory, the administrative law judge erred in *sua sponte* seizing upon an aggravation theory of recovery. Claimant responds that the theory of cumulative trauma was, in fact, raised by virtue of claimant's stipulation reserving a right to claim a "Gillette" injury,[1] and that, in any event, he also claimed that his injury occurred when carrying bags on October 14, 1989, which was the theory relied upon by the administrative law judge.

After considering employer's arguments, we affirm the causation findings made by the administrative law judge. To establish a prima facie case under Section 20(a), claimant must show that he has sustained a harm or pain which here is undisputed, and that conditions existed or an accident occurred which could have caused the pain. See, e.g., Sinclair v. United Food

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[1]A "Gillette" injury appears to be a cumulative trauma injury under state law.

and Commercial Workers, 23 BRBS 148 (1989). Once claimant establishes these two elements of his prima facie case, the Section 20(a) presumption applies to link the harm or pain with claimant's employment. *See, e.g., Stevens v. Takoma Boatbuilding Co.*, 23 BRBS 191 (1990). In analyzing the cause of claimant's injury, the administrative law judge initially found that despite conflicting evidence, claimant injured his left knee in 1979, not his right knee, and therefore no basis exists for holding American Grain liable for the present right knee claim. He further determined that claimant is entitled to invocation of the Section 20(a) presumption, as there is no dispute that claimant has an injury, i.e., a torn medial meniscus, and that claimant established the presence of working conditions on October 14, 1989, i.e., carrying 110-pound bags of grain, which could have caused or aggravated his injury. The administrative law judge reasoned that claimant's credible testimony that he suffered increased and severe pain that day while working and

his failure to return to work afterward, in conjunction with Dr. Person's opinion that claimant aggravated his condition on October 14, 1989, after being informed that claimant experienced increased symptoms while lifting 110-pound bags, established that claimants work at Meehan on the date in question could have aggravated his knee condition. The administrative law judge also specifically found that the statements contained in a June 11, 1990, letter from claimant's counsel to the district director, which employer asserts shows that no specific accident occurred in 1989, are not entirely inconsistent with the evidence that claimant's knee condition was aggravated in 1989, because counsel stated that claimant, "after having time to think it over, stated that the 'work he did' at Meehan (not the accident he had) temporarily aggravated his knee condition." Decision and Order at 27.

We affirm the administrative law judge's finding that claimant established

the "working conditions" element of his *prima facie* case under Section 20(a). In the present case, although the administrative law judge found that the specific accident which claimant alleged on October 14, 1989, i.e., stepping into hole, did not occur, he nonetheless found that claimant established that his work at Meehan on October 14, 1989, carrying 110-pound bags could have aggravated his pre-existing right knee problems. Inasmuch as claimant's amended claim and pre-hearing statement indicate that claimant alleged an injury on October 14, 1989, when he was carrying 110-pound bags, consistent with administrative law judge's findings with regard to the second prong of claimant's *prima facie* case, and it is evident from claimant's hearing and deposition testimony alleging re-injury, Ex. A-17 at 70, Tr. at 95, that a claim for aggravation was being made, we hold that the administrative law judge's decision comports with *U.S. Industries* and reject employer's arguments to the contrary.

We also reject employer's argument that the Supreme Court's decision in *Director, OWCP v. Greenwich Collieries*, _ U.S. _, 114 S.Ct. 2251, 28 BRBS 43 (CRT)(1994), invalidates the application of the Section 20(a) presumption. In *Greenwich Collieries*, the Court recognized that claimants Benefit from the statutory presumption provided by Section 20(a) *Id.*, 114 S.Ct. at 2259, 28 BRBS at 47 (CRT). The court's opinion has no effect upon invocation or rebuttal of Section 20(a). It holds that once Section 20(a) is rebutted, claimant bears the burden of proof, striking down the rule that where the evidence is equally balanced, doubt should be resolved in favor of claimant. *See Holmes v. Universal Maritime Service Corp.*, 29 BRBS 18, 21 n.3 (1995).

Meehan also avers that an award of benefits for the alleged accident on October 14, 1989, rewards a fraudulent claim, asserting that while claimant suffered from a knee condition, there was no showing that this condition was

related to claimant's employment. Meehan posits that claimants fabricated the story of the 1989 accident against Meehan because he found out that American Grain's carrier was in liquidation. The administrative law judge, however, fully considered the conflicting evidence regarding the circumstances surrounding the alleged October 14, 1989, injury, and acted within his authority in crediting claimant's testimony and Dr. Person's medical opinion that claimant sustained a work-related injury as alleged when he lifted 10-pound bags.

We reject employer's argument that Dr. Person erroneously relied on information that claimants's injury in 1979 was to his right knee and, thus, his opinion cannot properly support the findings made by the administrative law judge. Regardless of whether Dr. Person believed claimant's 1979 injury was to the left or right knee, he specifically opined that claimant sustained an injury to his right knee at work on October 14, 1989, while carrying 110-pound bags,

which aggravated his pre-existing right knee symptoms and resulted in greater disability. Inasmuch as the administrative law judge's finding that claimant sustained a work-related injury on October 14, 1989, while working for Meehan is rational, supported by substantial evidence, and comports with applicable law, and employer has failed to raise any reversible error, we affirm the causation findings made by the administrative law judge.

We also reject Meehan's argument that the administrative law judge erred in determining that it is liable as the responsible employer. Although Meehan argues that the administrative law judge erroneously applied the last employer rule, which only applies to occupational, and not traumatic injuries, we disagree. *See Foundation Constructors, Inc v. Director*, OWCP, 950 F.2d 621, 25 BRBS 71 (CRT)(9th Cir. 1991), *aff'g. Vanover v. Foundation Constructors*, 22 BRBS 453 (1989). In the case of multiple traumatic injuries, where, as here, a

subsequent injury, aggravates, accelerates, or combines with a prior injury resulting in claimant's disability, the subsequent injury is the compensable injury and the subsequent employer is responsible. *Id. See generally Lopes v. Southern Stevedores*, 23 BRBS-S 453 (1989); *Abbott v. Dillingham Marine & Manuf. Co.*, 14 BRBS 453 (1981),aff'd mem., No. 817801 (9th Cir. 1982). Accordingly, we affirm the administrative law judge's determination that Meehan is liable as the responsible employer, based on his finding that claimant sustained an aggravating injury while in its employ on October 14, 1989.

In light of our affirmance of the administrative law judge's causation and responsible employer findings, American Grains protective cross-appeal, BRB No. 92-2285A, is rendered moot.

SECTION 12 NOTICE

Meehan next argues that the administrative law judge erred in finding that it was not prejudiced by claimant's

failure to provide timely notice and that therefore claimant's untimely notice was excused pursuant to Section 12(d)(2). In the case of traumatic injury, claimant's failure to provide timely notice within 30 days of his awareness of his injury as required by Section 12(a), bars the claim unless excused under Section 12(d). Under Section 12(d), failure to provide timely written notice will not bar the claim if claimant shows either that employer had knowledge of the injury during the filing period, (Section 12 (d)(1)), or that employer was not prejudiced by the failure to give timely notice (Section 12(d)(2)). *See Addison v. Ryan-Walsh Stevedoring Co.*, 22 BRBS 32, 34 (1989); *Sheek v. General Dynamics Corp.*, 18 BRBS 151 (1986). In the absence of evidence to the contrary, it is presumed pursuant to Section 20(b) of the Act, 33 U.S.C §920(b), that employer as been given sufficient notice under Section 12. *See Shaller v. Cramp Shipbuilding & Dry Dock Co.*, 23 BRBS 140 (1989). To establish prejudice, employer must establish that due to claimant's

failure to provide timely written notice, it has been unable to effectively investigate some aspect of the claim. *See, e.g., Bivens v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 233 (1990).

Meehan contends that it has been prejudiced because if it had timely notice that claimant was raising a cumulative trauma theory it would have employed a different defensive trial strategy. These allegations of prejudice refer to trial tactics rather than to Meehan's inability to investigate some aspect of the claim. We therefore affirm the administrative law judge's finding that Meehan did not prove it was prejudiced by claimant's failure to provide timely notice on the facts presented in this case. *See generally Williams v. Nicole Enterprises*, 21 BRBS 164 (1988), *aff'd men. sub nom. Jones v. Director, OWCP*, 915 F.2d 1557 (1st Ci:. 1990).

AVERAGE WEEKLY WAGE

Meehan next argues that the administrative law judge erred in using Section 10(c) of the Act, 33 U.S.C §910(c), to calculate claimant's average weekly wage as $186. Meehan contends that because the only evidence relevant to claimant's average weekly wage was claimant's 1989 tax return which reflects earnings of $5,287.05, the administrative law judge should have calculated claimant's average weekly wage as $101.67 by dividing this figure by 52 weeks.

After review of the administrative law judge's decision in light of the evidence of record, we affirm his average weekly wage determination. In the instant case, the administrative law judge rationally applied Section 10(c) to determine claimant's average weekly wage because the record reflects that claimant's work was seasonal and discontinuous and that he worked only 43 days in 1989 prior to his injury. *Guthrie v. Holmes & Narver, Inc.*, 30 BRBS 48

(1996).[2] The object of Section 10(c) is to arrive at .a sum that reasonably represents a claimants's annual earning capacity at the time of his injury. *See Empire United Stevedores v. Gatlin*, 936 F.2d 819, 25 BRBS 26 (CRT)(5th Cir. 1991); *Richardson v. Safeway Stores, Inc.*, 14 BRBS 855 (1982). The administrative law judge is afforded broad discretion in arriving at a fair and reasonable approximation of claimant's earning capacity at the time of injury pursuant to Section 10(c). *See Bonner v. National Steel & Shipbuilding Ca*, 5 BRBS 290 (1977), *aff'd in pert. part*, 600 F.2d 1288 (9th Cir. 1979).

In calculating claimant's average

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[2]The administrative law judge also reasonably determined that claimant's average weekly wage could not be determined under either Section 10(a) or Section 10(b), 33 U.S.C. §910(a),(b), because the record did not reflect whether claimant was a 5 day or a 6 day worker, and contained no evidence regarding the wagesof a similarly situated worker. *See generally Browder v. Dillingham Ship Repair*, 24 BRBS 216, *aff'd on recon.*, 25 BRBS 88 (1991).

weekly wage under Section 10(c), the administrative law judge credited claimant's deposition testimony that he worked 116 days in 1984, 57 days in 1985, 129 days in 1985, 39 days in 1987, and 88 days in 1988. A-17, Ex. 2. The administrative law judge then noted that claimant's tax return for 1989 reflects that he earned $5,287.05, which when divided by 43 days worked, would yield a $122.95 daily wage. Proceeding on the assumption that claimant's daily wages were about the same for the days he worked in the prior five years, the administrative law judge multiplied the $122.95 daily wage figure by the number of days claimant worked during each of the preceding 5 years, and determined that claimant had average annual earnings for 1984 through 1989 of $9,675. He then divided this figure by 52 under Section 10(d)(1), to obtain an average weekly wage of $186. An administrative law judge may calculate average annual earnings under Section 10(c) based on claimant's earning pattern over a period of years prior to the injury, where, as

here, all of the years within that period are taken into account. *See Gatlin*, 935 F.2d at 819, 25 BRBS at 26(CRT); *Anderson v. Todd Shipyards*, 13 BRBS 593, 596 (1981). Inasmuch as the administrative law judge's calculation of claimant's average weekly wage is reasonable, supported by substantial evidence, and consistent with the goal of arriving at a sum which reasonably represents claimant's annual earnings at the time of his injury, we affirm his average weekly wage determination. *See Guthrie*, 30 BRBS at 52; *Gilliam v. Addison Crane Co*, 21 BRBS 91 (1987); *Geisler v. Continental Grain Co.*, 20 BRBS 35 (1987); *Turney v. Bethlehem Steel Corp.*, 17 BRBS 232 (1985).

SUITABLE ALTERNATE EMPLOYMENT

Meehan also contends that the administrative law judge erred in finding claimant permanently totally disabled, arguing that the testimony of its vocational specialist, Paul Genereux, is sufficient to meet its burden of

establishing the availability of suitable alternate employment and that the administrative law judge performed "mental gymnastics" to discredit this opinion. Meehan maintains that the opinion of Mr. Genereux should be credited over that of claimant's vocational expert, Mr. Casper, because Mr. Casper's opinion ,that claimant was unemployable is wholly unbelievable and is based on claimant's assessments of his limitations rather than on medical opinions.

As it is undisputed that claimant could not perform his usual work he established a *prima facie* case of total disability. Accordingly, the burden shifted to employer to demonstrate the availability of realistic specific job opportunities which claimant could perform, considering his age, education, work experience, and physical restrictions, and which he could secure if he diligently tried. *See Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980); *Royce*

v. Elrich Construction Co., 17 BRBS 157 (1985).

We affirm the administrative law judge's finding that employer failed to meet its burden of establishing the availability of suitable alternate employment through the testimony of its vocational expert, Mr. Genereux. The administrative law judge's decision to accord greater weight to the vocational testimony of claimant's vocational expert, Jack Casper, who after interviewing claimant, performing a transferable skills analysis, and administering a wide range achievement test, opined that there was no work in the local economy that claimant could perform, was a credibility determination within his authority. *Avondale Shipyards, Inc. v. Kennel*, 914 F.2d 88, [illegible] BRBS 46 (CRT) (5th Cir. 1990). Although Mr. Genereux identified available job opportunities as a security guard, parking lot attendant, and retail video store clerk which he believed that claimant could perform, the

administrative law judge rationally found his testimony insufficient to meet employer's burden of establishing the availability of suitable alternate employment. The administrative law judge reasoned that Mr. Genereux admitted that he was unaware as of the time he performed his labor market survey that claimant walked with a cane, Mx 15 at 70, and conceded that his opinion regarding claimant's ability to obtain a position could have been affected if he had known of a July 23, 1991, letter in which Dr. Moen stated that claimant had a degenerative knee condition which could affect the amount of walking he could do. Mx. 15 at 88. Moreover, because the security jobs identified by Mr. Genereux required alternating sitting and walking on a frequent basis depending on the size of the plant and the schedule of monitoring, and Drs. Moen, Person, and Engasser indicated that claimant should refrain from excessive walking, the administrative law judge rationally concluded that it was not clear that the jobs identified were, in fact, suitable.

Similarly, the administrative law judge rationally found that employer failed to establish that the video store cleric position Mr. Genereux identified was suitable, because Mr. Genereux identified was suitable, because Mr. Genereux. indicated that light stocking may be required and failed to provide any indication as to the amount of standing required, while claimant had both lifting and standing restrictions.

Finally, the administrative law judge rationally determined that employer did not meet its burden of establishing the availability of suitable alternate employment based on the two parking lot attendant positions Mr. Genereux identified at the Medical Arts Building and at St. Mary's. The record contains conflicting testimony as to the amount of walking required for the position identified at the Medical Arts Building. While Mr. Genereux indicated that this position required primarily sitting with some minimal standing and walking, claimants vocational, Mr. Casper,

testified that the position required considerable walking because attendants at that lot had to retrieve cars. The administrative law judge credited Mr. Casper's opinion and found that since Mr. Genereux may have been mistaken as to how much walking was required in the parking lot attendant position at the Medical Arts Building, he may also have been mistaken as to the physical requirements of the lot attendant position at St. Mary's; he accordingly rationally rejected these positions as unsuitable. Inasmuch as the administrative law judge's finding that Mr. Genereux's opinion was insufficient to meet employer's burden of establishing the availability of suitable alternate employment is rational, supported by substantial evidence, and comports with applicable law, and employer has failed to raise any reversible error made by the administrative law judge in evaluating the conflicting evidence and making credibility determinations, we affirm this finding. *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir.

1962), *cert. denied*, 372 U.S. 954 (1963); *Uglesich v. Stevedoring Services of* America, 24 BRBS 180 (1991).

ATTORNEY'S FEES

Turning to claimant's appeal of the district director's Compensation Order Award of Attorney's Fee, BRB 93-780, we note that claimant's counsel submitted a fee petition for work performed before the district director in which he requested an attorney's fee of $2,217.50, for 2.1 hours at $125 per hour for Attorney Courtney and 23 hours at $85 per hour for Attorney Margolis, plus $112 in expenses.

In a Compensation Order issued on November 2, 1992, the district director disallowed 21.8 hours, and awarded $247.50 representing 33 hours[3] at an hourly rate of $75 plus $112 in expenses.

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[3]The district director did not identify the itemized entries included in the 3.3 hours awarded.

In reducing the requested fee the district director stated:

> Only 33 hours, as itemized in counsel for the employer's Objection and Response, is traceable to any conceivable time spent on the claim against Meehan Seaway Service. The balance of the time was spent pursuing a claim against American Gram Trimmers, wherein no recovery was made. That 21.8 hours had no direct or indirect effect upon the ultimate award against Meehan. . .and cannot be considered to have been necessary. In fact, at the District Office level counsel for the claimant explicitly stated that no claim against Meehan. . .was being asserted.

Initially, we find no merit to claimant's suggestion that because the

administrative law judge held Meehan liable for the services rendered in connection with both the claim against American Grain and the claim against Meehan, the district director was required to award the requested fee; the determination of the amount of an attorney's fee is within the discretion of the body awarding the fee. See 33 U.S.C. §928(c); 20 C.F.R. §702.132. Nonetheless, we are unable to affirm the district director's fee award, because his reduction of the fee was based on application of an improper legal standard. The proper test for determining if an attorney's work is compensable is whether, at the time the attorney performs the work in question, he could reasonably regard the work as necessary to establish entitlement. *See, e.g., Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989). The district director in the instant case, however, utilized hindsight to determine that the time counsel expended building a case against American Grain was not necessary because ultimately claimant's recovery was from

Meehan. As was previously recognized by the Board in *Marcum v. Director, OWCP*, 12 BRBS 355, 362 (1980), "it is easy...to apply retroactive wisdom but it is entirely another matter for an attorney to predict accurately the ultimate usefulness of each action he takes to prepare his case." Moreover, "in the process of investigating and building evidence to support a claim, the attorney develops evidence which may or may not be used." Marcum, 12 BRBS at 361.

The record reflects that at the time that claimant filed his amended claim in May 1990, he was uncertain as to which employer was liable, as is evidenced by the fact that he named both American Grain and Meehan as responsible employers, and by counsel's subsequent June 1990 letter to Claims Examiner Stamper. M-6. Moreover, inasmuch as the amended claim was filed on May 9, 1990, prior to referral of the case to the Office of Administrative Law Judges on August 30, 1990, the district director erred in concluding that no claim against

Meehan had been asserted at the district director level. Moreover, much of the work claimed by counsel and disallowed by the district director would have been necessary to establish entitlement regardless of which employer claimant was proceeding against.

In light of these facts, we vacate the district director's fee award and remand the case to allow him to enter a reasonable attorney's fee for the necessary work performed by counsel in establishing entitlement consistent with the standard enunciated in *Marcum*, 12 BRBS at 362, and *Maddon*, 23 BRBS at 55.[4]

Accordingly, the administrative law judge's Decision and Order is affirmed. BRB Nos. 92 2285/A. The district

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[4]Meehan filed a cross-appeal of the district director's Compensation Order awarding an attorney's fee. BRB No. 93-780A. In an Order issued December 17, 1993, the Board directed Meehan to file a Petition for Review and brief in support of its cross-appeal. As Meehan has not complied with this order, its cross-appeal is deemed abandoned.

director's Compensation Order-Award of Attorney's Fee is vacated, and the case is remanded for reconsideration in accordance with this opinion. BRB No. 93-780. The cross appeal of the district director's Compensation Order-Award of Attorney's Fee is dismissed as abandoned. BRB No. 93-780A.

SO ORDERED.

/s/ Roy P. Smith
ROY P. SMITH
Administrative Appeals Judge

/s/ James F. Brown
JAMES F. BROWN
Administrative Appeals Judge

/s/ Nancy S. Dolder
NANCY S. DOLDER
Administrative Appeals Judge

C E R T I F I C A T E O F S E R V I C E

92-2285 Robert Hizinski v. American

Grain Trimmers, Meehan Seawav Service Inc.
Randles and Holbrook Claims Services
(Case No. 90-LHCA-3254)
(OWCP No. 10-0012916)

92-2285-A Robert Hizinski v. American Grain Trimmers, Inc., Meehan Seaway Services,
Randles & Holbrook Claims Services
(Case No. 90-LHCA-3254)
(OWCP No. 10-0012916)

93-0780 Robert Hizinski v. American Grain Trimmers Inc., Meehan Seaway Services,
Randles & Holbrook Claims Services
(Case No. 90-LHCA-3254)
(OWCP No. 10-0012916)

93-0780-A Robert Hizinski v. American Grain Trimmers, Inc., Meehan Seaway Services,
Randles & Holbrook Claims

Services
(Case No. 90-LHCA-3254)
(OWCP No. 10-0012916)

I certify that the parties below were served this day.

Sept 12, 1996 (DATE)

/s/ (for)
Thomas Shepherd, Jr.
Clerk of the Board

James Courtney, III, Esq., 227 West Fifth Street, 600 Missabe Building, DULUTH, MN 55802--Certified

John A. Mundell. Esq., Foster, Meadows, & Ballard, 3200 Penobscot Building, DETROIT, MI 48226--Certified

Ms. Carol A. DeDeo, Esq., Associate Solicitor, U.S. Department of Labor
200 Constitution Avenue, N.W.,Suite S-325
WASHINGTON, DC 20210--Certified

Judge Charles W. Campbell, Department of Labor, 525 Vine Street, Suite 900, US

Post Office and Courthouse, CINCINNATI, OH 45202

Robert Hizinski, 514 No. 21st Street SUPERIOR. WI 54880

Gregory P. Sujack, Esq.,Garofalo, Hanson, Schreiber and Vandlik, 211 West Wacker Drive, 14th Floor, CHICAGO. IL 60606 --Certified

Mr. Thomas C. Hunter, District Director OWCP-Longshore Division, 230 S. Dearborn Street, Room 578, CHICAGO, IL 60604 --Certified

Judge Kerry Anzalone, U S. Department of Labor, Office of Administrative Law Judges, 111 Veterans Memorial Blvd, Suite 530, METAIRIE, LA 70005

APPENDIX C

LETTER FROM CLAIMANT'S COUNSEL TO UNITED STATES DEPARTMENT OF LABOR
(EXCERPT)
JUNE 11, 1990
PAGE C - 187

ANSWERS TO INTERROGATORIES
(EXCERPT)
PAGE C - 189

TRANSCRIPT OF FORMAL HEARING
(EXCERPT)
PAGE C - 190

MOTION TO EXPEDITE
JANUARY 30, 1995
PAGE C - 191

(Excerpt of June 11, 1990, letter from Claimant's counsel, Dean M. Margolis, to Mr. James Stamper, of the Office of Workers' Compensation Programs, the Longshore Division, of the Employment Standards Administration, United States Department of Labor)

* * * * Page 2 * * * *

As stated in the Amended Employee's Claim for Compensation (form LS-203) the employee was working aboard a cargo ship known as The Gemini in Duluth, Minnesota as a grain handler or trimmer on this date. Mr. Hizinski informs me that the winch men had just brought in a pallet load of 110-pound bags of what he thinks was wheat. He stated there were eight men in the hole at the time, four men on each side of ship. Each man grabbing and pulling the wheat bags from the pallet over to the ship side, a distance of between 5-30 feet, then after the bags became piled up, the distance decreased gradually to five feet. This particular task did not involve anything else other

than lifting and carrying heavy bags. Mr. Hizinski's right knee did bother him after finishing this work on October 14, 1989. However, his knee did not bother him anymore than it had on previous occasions ever since his admitted work injury of 12-7-79 at American Grain Trimmers, Inc.

Mr. Hizinski further advises that the did not sustain any re-injury of his right knee while working for Meehan's Seaway Service, Ltd., in October 1889. Further, after having an opportunity to think the situation over, Mr. Hizinski believe that the work he did at Meehan's Seaway Service, Ltd., on or about October 14, 1989, was a temporary aggravation or exacerbation of this knee condition which has plagued him ever since his 12-7-79 work injury.

(Excerpt of Answers to Interrogatories by Claimant.)

* * * *

Q.4. Describe the personal injuries sustained by you as a result of said occurrance (sic).

ANSWER: Reinjured right knee.

MR. MARGOLIS: Which required him, the October 14, 1989 injury, it required him to lift, carry, and walk with 110 pound bags of grain, when he stepped in a hole, h-o-l-e, in a cargo hold, h-o-l-d, and injured his right -- strike that -- reinjured his right knee, the same knee he hurt in December of 1979 at American Grain

The testimony of Mr. William Nelson, the Claimant's co-worker, at the time of the December 7, 1979 injury at American Grain will establish that the claimant fell on his right side and injured his right knee in December of 1979.

The testimony of Claimant's immediate supervisor, or deck boss, at the time of his October 14, 1989 injury at Meehan, Mr. George Petrovich will establish that the Claimant did immediately report this new injury to his right knee, immediately after he finished his shift. And, therefore, that timely notice of this injury was given to the Employer.

BEFORE THE BENEFITS REVIEW BOARD
U.S. DEPARTMENT OF LABOR

ROBERT HIZINSKI	)	
Claimant-Respondent,	)	
	)	BRB No.
v.	)	92-2285 and
	)	92-2885A
MEEHAN SEAWAY SERVICES	)	
Employer-Carrier-	)	
Petitioners	)	
Cross-Respondents	)	
	)	
and	)	
	)	
AMERICAN GRAIN TRIMMERS	)	
	)	
Employer-Respondent	)	
Cross-Petitioner-A	)	

MOTION TO EXPEDITE

Employer/Petitioner, MEEHAN SEAWAY SERVICES, by and through its attorney, GREGORY P. SUJACK, hereby moves this Honorable Board to expedite the review process in this case. In support

thereof, movant states as follows:

1) This matter proceeded to trial before Administrative Law Judge Charles W. Campbell on September 9, 1991.

2) The District Director for the Tenth Compensation District filed the decision of the Administrative Law Judge on August 6, 1992.

3) The Employer filed a timely notice of appeal on August 11, 1992.

4) In conjunction therewith, the Employer sought a stay from this Board based on the alleged procedure and substantive improprieties at the formal hearing and the fact that these improprieties caused a deprivation of due process and other constitutional rights.

5) On August 20, 1992, the Board acknowledged that the Employer's appeal and denied motion to stay payment of the award.

6) The Employer sought review of the Board's denial of the stay in the Circuit Court of Appeals for the Eighth Circuit. The court affirmed the Board's denial of the stay in a decision dated September 9, 1993.

7) Since the decision of the Eighth Circuit, this matter has been returned to this Board for consideration.

8) Over 1 year has passed since the decision of the Court of Appeals. Over 2 years has passed since the filing of the appeal with this Board. To date, no decision from this Board has issued.

9) Given the nature of Judge Campbell's award of permanent total disability benefits, the Employer continues to suffer monetary loss as a result of the procedural improprieties and substantive errors at the formal hearing.

10) While the Act is compensate workers for injuries sustained, the process should not be such that the Employer suffers.

Wherefore, Employer, MEEHAN SEAWAY SERVICE, respectfully requests this Honorable Board to expedite its consideration of an decision in this matter. The Employer seeks whatever other relief as may be appropriate.

Respectfully submitted,

GAROFALO, HANSON, SCHREIBER
& VANDLIK
CHARTERED

By: /s/ Gregory P. Sujack
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Supreme Court, U.S.
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No. 97-1032

In the Supreme Court of the United States

OCTOBER TERM, 1997

MEEHAN SEAWAY SERVICE COMPANY, ET AL.,
PETITIONERS

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION
PROGRAMS, DEPARTMENT OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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15 pp

QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that petitioners had adequate notice satisfying due process requirements that a worker's claim under the Longshore and Harbor Workers' Compensation Act was potentially based on a "cumulative trauma" or "aggravation of pre-existing condition," rather than merely on a "specific accident" injury.

2. Whether the court of appeals correctly held that the Benefits Review Board's delay in ruling on petitioners' appeal was not unreasonable and did not violate petitioners' due process rights.

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MEEHAN SEAWAY SERVICE COMPANY, ET AL., PETITIONERS

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A22) is reported at 125 F.3d 1163. The decision and order of the Benefits Review Board (Pet. App. B152-B186) is unreported. The decision of the administrative law judge (Pet. App. B23-B151) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 15, 1997. The petition for a writ of certiorari was filed on December 15, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Respondent Robert Hizinski worked as a longshoreman for petitioner Meehan Seaway Service Company (Meehan). Pet. App. A2. On October 14, 1989, at the end of a workday spent carrying 110-pound sacks of grain across the uneven surface of other sacks, Hizinski informed his supervisor that his right knee was hurting. *Ibid.* He underwent knee surgery three months later and has not worked since the surgery. *Id.* at A3.

In February 1990, Hizinski filed a claim under the Longshore and Harbor Workers' Compensation Act (LHWCA or the Act), 33 U.S.C. 901 *et seq.*, for disability benefits arising out of an injury to his right knee that occurred in December 1979 during his employment with American Grain Trimmer. Pet. App. B56. Shortly thereafter, in May 1990, he amended his claim, stating that it was based on both the 1979 injury and on the injury that occurred on October 14, 1989, during his employment with Meehan. *Id.* at A3, B60.

2. After a hearing, the Department of Labor (DOL) administrative law judge (ALJ) issued a decision and order requiring Meehan to pay benefits. The ALJ initially found that Hizinski's 1979 injury was to his left, not his right knee, and thus that American Grain Trimmer was not liable for Hizinski's current claim based on a right knee injury. Pet. App. B77-B86.

Turning to petitioner Meehan's liability, the ALJ determined that Hizinski was entitled to the presumption under Section 920(a) of the LHWCA that his injury was caused by his employment with Meehan and therefore covered by the Act. 33 U.S.C. 920(a). To invoke the presumption, a claimant must show

"the existence of an injury and an accident or a working condition that could have caused the injury." Pet. App. B94 (citing cases).[1] A claimant may "establish his prima facie case if he can show that the working condition exacerbated or aggravated [a pre-existing] condition." *Id.* at B98 (citing cases). Once that prima facie showing is made, the burden shifts to the employer to come forward with substantial evidence that "severs the [presumed] causal connection between the claimant's injury and his employment." *Id.* at B110.

Applying that standard, the ALJ found that, although Hizinski failed to prove his assertion that he had suffered a "specific accident" on October 14, 1989, Hizinski's evidence did support a finding that he suffered from a pre-existing right knee condition that was aggravated on that date, Pet. App. B94-B95, B109 ("claimant's testimony showed that he suffered increased and severe pain on that day while working"), and that Hizinski's working conditions that day, involving the carrying of 110-pound bags, could have been the cause of the aggravation. *Id.* at B104-B105. The ALJ determined that the evidence was sufficient to invoke the Section 920(a) presumption. The ALJ further concluded that Meehan did not submit substantial evidence in rebuttal that would overcome the presumption of a causal nexus between the working conditions at Meehan and the aggravation of Hizinski's knee condition. *Id.* at B110-B111. In particular, the ALJ found that no physician testified that

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[1] Section 920(a) provides that "it shall be presumed, in the absence of substantial evidence to the contrary, * * * [t]hat [a] claim [for compensation] comes within the provisions of this chapter." 33 U.S.C. 920(a).

Hizinski's work on October 14, 1989, did not aggravate his condition, whereas one physician testified that such aggravation did occur. *Id.* at B110.[2]

The ALJ concluded that Hizinski was permanently totally disabled and was therefore entitled to benefits based on an average weekly wage of $186.00. Pet. App. B117-B148.

3. In August 1992, Meehan appealed to the Benefits Review Board.[3] In September 1996, the Board affirmed the ALJ's decision and order.[4] The Board

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[2] The ALJ also held that Hizinski's failure to provide timely formal notice under the 30-day time limit of Section 912(a) of the LHWCA, 33 U.S.C. 912(a), was excused because, under Section 912(d)(2), 33 U.S.C. 912(d)(2), Meehan was not prejudiced by the failure to give such notice. Pet. App. B111-B116. It was not disputed that Hizinski's claim against Meehan was timely under Section 913(a)'s one-year limitation period. See 33 U.S.C. 913(a). There was, however, a dispute about whether Hizinski met the requirements of Section 912 pertaining to a claimant's obligation to provide formal notice to the employer. See 33 U.S.C. 912(a) (requiring notice of injury within 30 days of date of injury or 30 days after claimant is, or should have been, aware of relationship between injury and employment); 33 U.S.C. 912(d) (conditions under which failure to give notice is excused, including where employer or carrier was not prejudiced).

[3] Meehan sought a stay of the ALJ's award of benefits pending appeal, which the Board denied on August 20, 1992. Meehan then appealed the Board's denial of a stay, but the court of appeals, on September 9, 1993, affirmed the denial. *Meehan Seaway Serv. Co.* v. *Director, OWCP*, 4 F.3d 633 (8th Cir. 1993).

[4] Although no attention was directed to the point below, and nothing turns on it, it should be noted that the Benefits Review Board lacked authority to issue the decision on September 12, 1996. The Department of Labor Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321-219, provided that in the

rejected Meehan's argument that the ALJ erroneously applied the Section 920(a) presumption to award benefits based on a cumulative trauma that Hizinski had never explicitly asserted. The Board concluded that the presumption was properly invoked because the claimant had shown that he suffered an injury in the form of a torn medial meniscus and that working conditions existed at Meehan on October 14, 1989, that could have caused or aggravated this injury. Pet. App. B160. The Board further held that it was evident from Hizinski's claim and pretrial statement, in conjunction with his hearing and deposition testimony, that his claim encompassed the allegation that his knee condition had been aggravated. *Id.* at B162; see also *id.* at B159 & n.1 (noting that Hizinski's pre-hearing stipulation "reserv[ed] a right to claim a 'Gillette' injury," which the Board understood to be a cumulative trauma). The Board further concluded that the ALJ's finding that Hizinski sustained a work-related injury on October 14, 1989, was supported by substantial evidence. *Id.* at B165.[5]

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absence of action by the Board *before* September 12, 1996, any ALJ decision pending before the Board for more than one year would be "considered affirmed by the * * * Board on that date, and * * * considered the final order of the Board for purposes of obtaining [judicial] review." Because the Board did not issue a decision *before* September 12, the ALJ's decision became, by virtue of the Appropriations Act, the final order of the Board. Nonetheless, because the Board purported to do what the Act "considered" it to have done by operation of law (*i.e.*, affirm the ALJ), the case has proceeded in the same manner as envisioned by the Appropriations Act, and we describe the Board's decision as pertinent background in the case.

[5] The Board also upheld the ALJ's ruling that Meehan was not prejudiced by Hizinski's failure to provide timely formal notice of his claim pursuant to 33 U.S.C. 912(a). The Board

4. The court of appeals affirmed the Board's decision, rejecting Meehan's argument that the ALJ had violated its due process rights by basing its decision on a theory that Hizinski did not assert—namely, that his claim was for "cumulative trauma or aggravation of pre-existing injury," rather than for a specific trauma occurring on October 14, 1989. The court reasoned that Hizinski's complaint "notified Meehan that he had received an injury to his right knee which he claimed was related to his employment," and that his pretrial stipulation preserved his right to claim that his knee injury was in the nature of a *Gillette* injury (*i.e.*, a cumulative injury of the nature addressed in a decision under state law of that name) or occupational disease. In addition, three months before the hearing, Hizinski notified DOL and the claim representative for Meehan's insurer that Hizinski's work at Meehan had temporarily aggravated his knee condition. Pet. App. A9. The court concluded that Meehan was thereby "put on notice prior to the hearing date that there was uncertainty as to the nature of Hizinski's injury with a possibility of cumulative trauma," and that Meehan was not prejudiced by any lack of specificity regarding the nature of Hizinski's injury. *Id.* at A10.

The court of appeals also rejected Meehan's arguments that (1) Hizinski was not entitled to invoke the Section 920(a) presumption "because he did not elect to proceed under a theory of cumulative trauma and

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affirmed the ALJ's finding that Meehan had failed to show that it was unable to investigate the claim effectively due to the late notice. Pet. App. B168. The Board also upheld the ALJ's calculation of claimant's average weekly wage and the ALJ's finding that there was no suitable alternate employment available to claimant. *Id.* at B169-B178.

he did not present testimony of a degenerative condition," and (2) even if he was entitled to the presumption, the ALJ erred in finding that the presumption was not rebutted. Pet. App. A12. As to Meehan's first argument, the court reiterated its finding that Hizinski did make a "sufficient claim for a degenerative condition or cumulative trauma and there was substantial evidence to support the finding of the ALJ." *Ibid.* As to Meehan's second argument, the court upheld the ALJ's finding that Meehan had not rebutted the Section 920(a) presumption as supported by substantial evidence, explaining that "[t]he credibility determinations and considerations of the ALJ as to the weight of the evidence are not for our review." *Id.* at A13.[6]

Finally, the court of appeals held that the four-year delay of the Benefits Review Board in ruling on Meehan's appeal of the ALJ's decision did not violate Meehan's due process rights. Although it acknowledged that "[a]t some point a delay in the opportunity for administrative and judicial review can amount to a denial of due process," Pet. App. A22, the court concluded that the delay in this case was not unreasonable for two reasons: (1) the delay was due in part to Meehan's unsuccessful prior appeal to the court of appeals of the Board's denial of a stay;[7] and (2) the delay was also partially attributable to a loss of case records during their transmission, and the need to reconstruct those records. *Ibid.*

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[6] The court of appeals also upheld the ALJ's calculation of Hizinski's average weekly wage and the ALJ's finding that Hizinski was permanently totally disabled. Pet. App. A14-A21. Petitioners do not seek review of these rulings.

[7] See note 3, *supra*.

ARGUMENT

The court of appeals held that petitioners' due process rights were not violated because (1) respondent gave Meehan adequate notice of the nature of his claim for benefits under the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 901 *et seq.*; and (2) the Benefits Review Board did not engage in unreasonable delay in issuing a decision affirming the award of benefits. Those fact-bound rulings do not conflict with any decision of this Court or another court of appeals or warrant review by this Court.

1. Petitioners assert (Pet. 6-12) that the ALJ violated their due process rights by awarding LHWCA benefits based on a theory that respondent did not present or prosecute. In what is essentially a restatement of that argument, but which is presented as a second ground for review, they also contend (Pet. 12-17) that the ALJ violated their due process rights by employing the Section 920(a) presumption "to award benefits on a theory of recovery never prosecuted by [c]laimant." Pet. i. In support of those arguments, petitioners assert that the ALJ awarded benefits to Hizinski based on a cumulative trauma theory despite the fact that Hizinski alleged only that he suffered a specific traumatic accident.[8]

Contrary to petitioners' claim, both the court of appeals and the Benefits Review Board correctly concluded that Hizinski did give adequate notice of the nature of his claim. Although the ALJ found that claimant's allegation of the occurrence of a specific

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[8] Petitioners do not dispute that Hizinski's injury is of a type cognizable under the Act; they assert only that they had inadequate notice of the nature of the claim of injury.

accident (*i.e.*, stepping into a hole between two grain sacks) was not supported by the evidence, see Pet. App. B97, the ALJ found that the evidence did support his claim of a "second injury" or "reinjur[y]" occurring on that date. *Id.* at B106-B107. In affirming the ALJ's decision, both the Board and the court of appeals rejected petitioners' arguments that they were not adequately notified of the "reinjury" theory. The Board found it "evident from claimant's hearing and deposition testimony alleging re-injury that a claim for aggravation was being made." *Id.* at B162 (citations omitted). The court of appeals further stated that, in addition to alleging an injury related to his Meehan employment, claimant "filed a Pretrial Stipulation in which he provided notice to Meehan that he wished to reserve the right to claim that his knee injury was in the nature of a 'Gillette' injury or occupational disease." *Id.* at A9. The court concluded that that stipulation, along with other evidence proffered by Hizinski before and during the hearing, was sufficient to put Meehan on notice of the "possibility of cumulative trauma. " *Id.* at A10. In any event, the question of whether the court of appeals and the Board were correct in their view that the record in this case shows that Hizinski gave adequate notice of the nature of his claim and that petitioners were not prejudiced by the lack of specificity of the notice is a narrow, fact-specific issue that does not warrant consideration by this Court.

Petitioners' reliance (Pet. 10-11) on *U.S. Industries/Federal Sheet Metal, Inc.* v. *Director, OWCP*, 455 U.S. 608 (1982), is misplaced. In that case, an LHWCA claimant alleged that he had suffered an injury at work on a particular workday, but the ALJ concluded that no such injury occurred and denied

benefits. *Id.* at 616. The court of appeals reversed on the theory that the claimant had suffered an injury at home when he awoke in pain the following morning, and determined that the claimant was entitled to the Section 920(a) presumption that the injury was "employment-bred." *Id.* at 612. This Court reversed, holding that the claimant had not claimed such an injury and that the Section 920(a) "presumption did not require [the ALJ] to adjudicate any claim that was not made." *Id.* at 616. This case is quite different, inasmuch as both the Board and the court of appeals concluded that Hizinski did assert an alternative cumulative trauma theory before the ALJ, and the ALJ expressly found that such an injury (aggravation of his knee condition) occurred.

2. Petitioners also argue (Pet. 17-20) that their due process rights were violated by the Benefits Review Board because the Board unreasonably delayed in issuing a decision on their appeal of the ALJ's decision. The court of appeals held, however, that the Board's delay in processing this case was not unreasonable, and was explained in part by petitioners' appeal of the Board's decision denying a stay and by the Board's need to reconstruct case records that were lost in transmission. Pet. App. A22. The question of the reasonableness of the Board's delay under the circumstances of this case is not worthy of this Court's review. Moreover, even if there had been unreasonable delay on the part of the Board, the usual relief granted in such a situation is a mandamus order requiring the agency to act. Cf. *Telecommunications Research & Action Ctr.* v. *FCC*, 750 F.2d 70, 79 (D.C. Cir. 1984) (relief for unreasonable agency delay is mandamus order requiring agency to act). Since the

Board has already issued a decision in this case, it is not clear what relief petitioners seek for past delay.

In any event, Congress has now spoken to the issue of Board delay in the Department of Labor Appropriations Acts of 1996, Pub. L. No. 104-134, 110 Stat. 1321-219, which provides in pertinent part that, beginning September 13, 1996, the Board shall make a decision in LHWCA cases within one year after an appeal to it has been filed and, if it fails to do so, the decision under review shall be considered the final order of the Board for purposes of obtaining court of appeals review. See also Department of Labor Appropriations Act of 1997, Pub. L. No. 104-208, 110 Stat. 3009-241 (continuing one-year limit on pendency of appeals to Board); Department of Labor Appropriations Act of 1998, Pub. L. No. 105-78, 111 Stat. 1476 (same). Thus, under the current scheme, delays of the magnitude in this case will not occur. This Court's review of the question of what constitutes unreasonable Board delay would therefore serve little useful purpose with regard to the Board's current processing of cases.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1998